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APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

3341.A. 103

Appellant.

October 21, 1942 plaintiff had judgment by confession against defendant in the amount of \$695 for rental alleged to be due under a five-year written lease entered into January 1, 1939 and expiring December 31, 1943. The demised premises consisted of a tract of ground improved with stables, caretaker's house, riding track and a small recreational building, located north of Devon avenue near the Des Plaines River in Cook County, adjacent to the Forest Preserve, used by defendant as a horseback riding stable and school. Shortly after the execution of the lease the defendant Bernard met with an accident, and thereafter Raymond Bairstow took possession of and operated the riding academy. In October 1945 the judgment was opened up on plaintiff's motion, with a request that unpaid rental for subsequent months also be included in the judgment. Summons was issued against Bairstow, who had been made a party defendant, but the sheriff was unable to locate and serve him. In the order vacating the judgment plaintiff had leave to file an amended complaint, to which Bernard filed his verified answer admitting the execution of the lease and averring that a portion of the demised premises had been taken by the County under condemnation proceedings without his knowledge or consent and that a deed to the condemned portion was given by plaintiff to the County of Cook, thus constituting a constructive eviction and impairing the usefulness of the property for the purpose for

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June 1950

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To the Honorable Members of the County Board of the County of Madison, Wisconsin:

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County of Cook, Illinois, this 11th day of August, 1934, the following persons, being duly sworn, depose and say that the foregoing is a true and correct copy of the original of the same as the same appears in the files of the County of Cook, Illinois, and that they are not aware of any other copies of the same.

improving the usefulness of the property for the purpose of

which it had been rented. November 27, 1945 plaintiff filed a motion to strike defendant's answer, but on November 28, 1945, when the case appeared on Judge Prystalski's trial call, it was dismissed for want of prosecution without the knowledge of either of the attorneys. In February 1946 plaintiff again filed a motion to strike defendant's answer to her amended complaint, and the court allowed that portion of the motion which sought to strike defendant's defense of condemnation proceedings as ground for cancellation or termination of the lease in question. Various pleadings followed and subsequently the case again came up on Judge Prystalski's assignment call on June 10, 1946. Bernard's counsel appeared and advised the court that neither Bernard nor any of his witnesses would be available until June 17 and asked that the case be held on the assignment call until that time. The request was not granted, but the case was held on the call until June 12, when it was assigned for immediate trial before Judge Berkowitz. Defendant's counsel then filed a written motion to continue the case for hearing until June 17, supported by his affidavit alleging in substance that neither Bernard nor his witnesses were available and that he was not prepared to go to trial. Judge Berkowitz denied the motion, proceeded to hear evidence until June 13 and then entered an order finding the issues in favor of plaintiff, assessing damages and entering the judgment from which this appeal was taken, without vacating Judge Prystalski's prior order of November 28, 1945 dismissing the suit for want of prosecution.

Subsequently on July 8, 1946 Bernard filed his motions for a new trial and in arrest of judgment. These motions were set for hearing on July 19. On that day plaintiff's attorneys presented a petition asking that the order entered November

[illegible]

28, 1945 by Judge Prystalski dismissing the cause be vacated and set aside nunc pro tunc as of November 28, 1945. The petition was granted and the nunc pro tunc order was entered. At the same time defendant's motions for a new trial and in arrest of judgment were overruled.

As the first ground for reversal it is urged that the trial judge abused his judicial discretion by denying defendant's motion to hold the cause on the trial calendar until June 17, 1946. It is doubtful whether defendant's motion for a continuance and the affidavit in support thereof is properly preserved for review because the record on appeal does not contain any report of proceedings at the trial, but from the arguments of counsel it appears that the trial judge did not abuse his discretion in denying the motion for a continuance because the affidavit which counsel discuss in the briefs did not set forth sufficient grounds for a continuance. Supreme Court rule 14 provides, among other things, that when either party shall apply for a continuance on account of the absence of material evidence, the motion shall be supported by affidavit showing that due diligence has been used to obtain such evidence or that there was not sufficient time in which to obtain it, and setting out the particular facts pertaining thereto, and if the evidence consists of the testimony of a witness, his place of residence shall be set forth. The rule also provides that a motion for the continuance of a cause made after it has been reached for trial shall not be heard unless a sufficient excuse is shown for its delay. In this instance the only reasons set forth in defendant's motion were that neither he nor any of his witnesses were available for trial until June 17, but none of the other requirements of the rule were complied with, and under the

circumstances we think the court was fully justified in denying the motion.

The second and principal ground for reversal is that defendant as lessee was entitled to the quiet and undisturbed use of all the demised premises during the entire period of the lease, and that the taking and sale of any portion thereof by the lessor without the lessee's consent (through condemnation proceedings) constituted constructive eviction and terminated the lessee's liability. Although there is no report of proceedings, as heretofore stated, the fifth paragraph of plaintiff's replication to defendant's amended answer "Admits that the very small portion located in one corner of the premises described in the lease was taken by condemnation proceedings by the County of Cook and in conformance and in compliance therewith, a Deed was given by the plaintiff to the County of Cook, on or about the 19th day of October, 1939." This admission is in effect a denial that any considerable portion of the premises was disposed of by plaintiff through sale to the County of Cook, as alleged in the amended fifth paragraph of defendant's answer, and in the absence of any report of proceedings we must presume that the evidence was sufficient to sustain the judgment on the theory that the taking of a portion of leased premises by right of eminent domain, leaving a portion thereof susceptible of occupancy under the lease, does not effect a constructive eviction of the lessee and does not relieve the lessee of the payment of any part of the rent provided by the lease. As early as 1893 it was held in Corrigan v. City of Chicago, 144 Ill. 537, that "a taking under the right of eminent domain is not a breach of the covenant for quiet enjoyment, and does not technically amount to an eviction. * * * And when a

portion only of the land is taken, and a portion remains, which is susceptible of occupation under the lease, we have held, following what we regard as the weight of authority, that the covenants of the lease are not abrogated, and that the tenant is bound by his covenant to pay full rent according to its terms." Recently, in Leonard v. Autocar Sales & Service Co., 392 Ill. 182, the court held it to be the settled rule that where only a part of the premises is taken, leaving a part susceptible of occupation under the lease, the tenant is not relieved from the payment of any part of his rent.

Another ground urged for reversal is that on dismissal of a suit the parties are out of court and all further proceedings are unauthorized until the order of dismissal is vacated and the cause reinstated; and that a judgment entered subsequent to the dismissal and prior to the vacating of the order of dismissal is a nullity and cannot be sustained. A sufficient answer to this contention is that the order of dismissal was made without the knowledge of counsel on either side and that the attorney for defendant apparently made no objection to the vacating of the dismissal order, thereby waiving the right to claim that the court lacked jurisdiction to enter the judgment from which this appeal is taken.

It would be difficult to conceive of any cause founded upon a simple claim for rent where so many motions and pleadings, both before and after trial and also during the pendency of the appeal, appear to have been filed by defendant which have no direct bearing upon the merits of the cause. However, the execution of the lease is admitted, the amount claimed to be due is substantially undisputed, and the only pertinent questions raised affecting the merits of the controversy

have heretofore been discussed. Since we find no convincing reason for reversal, the judgment of the Circuit Court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

February Term, A.D. 1948

General No. 9573

Agenda No. 16

Carrol Nees,)	
Petitioner-Appellant,)	Appeal from the
)	County
vs.)	Circuit Court of
)	
Floy Thorson,)	Ford County.
Respondent-Appellee.)	

Wheat, P.J.

334 I.A. 73

This appeal concerns the right to custody of a minor child. On December 30, 1946, an order of the County Court of Ford County determined that Karyl Kay Nees, age five, was a dependent child; Floy Thorson was named as guardian, and the child was permitted to remain in the home of Raymond M. Luedde and Litta M. Luedde, his wife. On May 14, 1947, the father of the child, Carrol Nees, the appellant herein, filed his petition in such Court, requesting custody of his daughter. Upon hearing, his petition was denied, from which order this appeal follows.

The original dependency proceeding was instituted by virtue of the provision of "An Act Relating to Children", being Sections 190-220, Chap. 23, Illinois Revised Statutes 1945. The petition of Carrol Nees, the father, was filed under Section 202 of this Act, as follows:

"Whenever it shall appear to the Court before or after the appointment of a guardian under this act that the home of the child or of his parents, former guardian or custodian is a suitable place for such child and that such child could be permitted to remain or ordered to be returned to said home consistent with the public good and the good of such child, the Court may enter an order to that effect returning such child to his home under probation, parole or otherwise; it being the intention of this act that no child shall be taken away or kept out of his home or away from his parents and guardian any longer than is ^{reasonably} necessary to preserve the welfare of such child and the interest of this State: * * * "

It appears that Karyl Kay Nees was born August 22, 1941, her parents being Carrol Nees and Vera Nees. The latter died October 22, 1944. From April to August, 1943, while the child's mother was in a sanitorium, Karyl lived in the home of her mother's sister, Wilma Woodward. Thereafter, until September, 1944, she lived with her father, and then in two private homes, under the direction of a Welfare Service. From September, 1944, until June, 1945, Mrs. Woodward again had the child. On April 6, 1945, Carrol Nees, the father, remarried and lived in Florida, where he made a home for Karyl from June, 1945, until August, 1945. As a result of domestic difficulties, resulting later in divorce, the father placed the child with his sister at Normal, Illinois, where she lived until December 19, 1945, when she again went to live with Mrs. Woodward until November 30, 1946, at which time she went to the home of Mr. and Mrs. Raymond Luedde, where she has since remained. The amount of support contributed by the father, Carrol Nees, during all this time, is in dispute.

This entire matter had its inception in the desire of Mr. and Mrs. Luedde to adopt the child. They retained an attorney to accomplish that result, and he prepared and filed a dependency petition December 3, 1946, signed by Floy Thorson. The petition erroneously stated that the child was in the custody of Wilma Woodward, whereas in fact the child had, since November 30, 1946, been living in the home of the Lueddes, who were not made parties to the proceeding as required by statute. Service on the father, Carrol Nees, was had by publication but it appears from his testimony that he had no actual knowledge of the matter until sometime after the order was entered. A hearing was had, and by order of December 30, 1946, the child was declared dependent, and Floy Thorson was appointed guardian with power to consent to adoption. The guardian thereafter permitted the child to remain in the home of the Lueddes. This entire proceeding was handled by an attorney for the Lueddes, the State's Attorney making no appearance, if, in fact, he had any knowledge of the matter.

On May 14, 1947, Carrol Nees, the child's father, filed his petition asking custody of the child. A hearing was had resulting in a denial of his petition, on May 31, 1947. Again, the Lueddes, who were not parties to the action, were represented by the same attorney as before, who conducted the examination and cross-examination of witnesses. As before, the State's Attorney did not appear or participate in the proceedings.

On this hearing, it appeared without dispute that Carrol Nees was residing in Augusta, Georgia, earning between

\$65 and \$100 per week as a garage mechanic; that he does not drink or gamble, belongs to and attends church; that he married Lorraine Nees, December 19, 1946; that she was a nurse, being a graduate of the University of Georgia School of Nursing; that she has a daughter five years old by a former husband; that they were living in an apartment in Augusta; that she owns a five-room modern home in Edgefield, South Carolina, 25 miles from Augusta, to which they plan to move, making a home for themselves and her five year old daughter and Karyl; that his wife planned on giving up nursing; that she belongs to and attends the same church as her husband and that her daughter regularly attends Sunday school; that both want Karyl in their home; that he plans on driving back and forth, daily, the 25 miles from Edgefield to Augusta, over a hard-surfaced road.

Apparently, the Court arrived at its decision by a comparison of the advantages to the child in the home of Mr. and Mrs. Luedde, and in the home of the petitioners. Although there is no question as to the character of Mr. and Mrs. Luedde and their desire and ability to properly care for and rear the child, this is not the test. The sole question is whether the father is a fit and proper person to have the child and can properly maintain, educate and rear such child. (Gormack v. Marshall, 211 Ill. 519). In this case the petitioner, Carrol Nees, made such a showing and the Court erred in not granting him custody of his daughter.

In view of what this Court has said in the case of People v. Hinton, 330 Ill. App. 130, it is difficult to comprehend why the County Court permitted the proceeding to be

handled from its inception by an attorney representing persons not even parties to the case, instead of directing the appearance of the State's Attorney. Had this been done, the original petition, which erroneously stated that Karyl was in the custody of Mrs. Woodward instead of the Lueddes, undoubtedly would have been dismissed. Upon the institution of any proceedings under this Act, the people become the real parties to the controversy. (People v. Day, 321 Ill. 552).

It is unnecessary to determine the validity of the order of December 30, 1946, as the Court has ample power, under Sec. 202 of this Act, to do justice between the parties.

By reason of the foregoing, the order of the County Court entered May 31, 1947, is reversed and remanded with directions that an order be entered declaring that Karyl Kay Nees is not a dependent child, that Floy Thorson as guardian be discharged, and that the custody of the child be granted to Carrol Nees, her father. Costs are assessed against appellee.

Reversed and remanded
with directions.

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THIRD DISTRICT

Agenda No. 19

Appeal from

Circuit Court of

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The second count alleges that on March 20, 1946,

"defendant contracted with plaintiff to make for defendant 20,000 stakes, (that) defendant agreed to pay plaintiff 18 cents (sic) each for said stakes,"

that plaintiff made and delivered and defendant accepted 13,292 of said stakes and that the

"stakes so delivered at the price of .18 cents (sic) each amounted (including Retailer's Occupational Tax) to the sum of \$2463.31."

Count 2 further alleges that "defendant refused to accept 6708 of said stakes," thereby depriving plaintiff of \$250.00 profit which plaintiff could have made thereon. Count 2 further alleges that plaintiff planed 9578 stakes at defendant's request

"which planeing (sic) was not contemplated by said original contract (and that) the price for such planing (sic) was the sum of 3 cents per stake, being the sum of \$287.34."

The third count is substantially the same as the second except that the contract for 20,000 stakes is alleged to have been entered into on defendant's behalf by defendant's agents and servants and no claim is made for damages resulting from defendant's refusal to accept a part of the 20,000 stakes. Each of the three counts admits the payment on account by defendant in the sum of \$653.62 so that the first count alleges a balance due of \$1410.92, the second count alleges a balance due of \$2347.03 and the third count alleges a balance due of \$2207.03 and prays judgment in the amount of \$2500.00. An itemized statement of account attached to the complaint sets forth a balance due of \$2074.12.

Defendant's answer denies all of Counts 1, 2 and 3, and in answer to the entire complaint, admits defendnt's

refusal to accept certain stakes delivered by plaintiff because the same had not been ordered by defendant, admits that defendant ordered and received 9428 stakes from plaintiff, alleges that there became due plaintiff therefor the sum of \$1414.20, and further alleges the payment to plaintiff on May 13, 1946, the sum of \$653.62 on account therefor. At the time he filed his answer, defendant tendered and deposited with the Clerk of the County Court \$786.23, being the balance claimed by him to be due, with interest, but excepting the amount claimed due by plaintiff for Retailer's Occupational Tax, the legality of which defendant questioned.

Subsequently, plaintiff filed motion for summary judgment, together with two supporting affidavits. The first, by Charles F. Castleman, specifically makes plaintiff's complaint a part of the affidavit and further avers that

"During the month of March or first part of April, 1946, the defendant ordered from plaintiff . . . 20,000 oak stakes . . . at and for the price of 18 cents (sic) per stake",

that plaintiff manufactured and delivered to defendant 11,877 stakes at a price of 18 cents per stake as shown by invoices attached to the affidavit and

"1415 stakes, being the last of said deliveries, inventoried (sic) at .10 cents (sic) each . . . (and that) the sum total due plaintiff from the defendant for said stakes so made and delivered is \$2279.36"

plus \$26.65 interest, less \$653.62 paid on account by defendant, leaving due plaintiff from defendant \$1651.39.

The second affidavit, by plaintiff's secretary and office manager, avers that the invoices attached to the affidavits are correct and true to the best of her knowledge and belief, that C. H. Cargill, defendant's authorized

agent, came to plaintiff's office on or about May 1, 1946, and gave to affiant an order for plaintiff "to make up all said 20,000 stakes by June 1, 1946", that on or about May 15, the said C. H. Cargill cancelled all stake orders and deliveries by letter of said date, copy of which was attached to the affidavit, that

"up to the receipt of said letter 11,877 stakes had been manufactured and delivered to the defendant (that) thereafter 1416 stakes were delivered to said defendant and billed at 10 cents each."

Defendant thereafter filed his counter affidavit of merits, stating that

"defendant did order certain stakes from plaintiff without agreement with the plaintiff as to the price to be paid therefor on the assumption that said stakes would be priced at prevailing OPA ceiling prices or . . . at a reasonable, usual and customary price per stake . . . that the plaintiff did deliver said stakes pursuant to said order, billing (defendant) therefor at a rate approximately 2½ times the OPA ceiling price for stakes . . . and approximately 2½ times the reasonable, customary and usual price charged for similar stakes in the construction industry",

and that upon the delivery of the first quantity of stakes, defendant informed plaintiff

"not to make any more stakes at the charged price and that defendant would secure stakes elsewhere at a reasonable price; (that notwithstanding) plaintiff proceeded to make subsequent deliveries and to bill defendant at said . . . unreasonable price . . . that defendant refused to accept said stakes when subsequently delivered, that defendant did not use . . . and did not have knowledge of the delivery of (said latter stakes) receipts being signed therefor by persons unauthorized to represent defendant."

Plaintiff moved to strike defendant's affidavit of defense and moved for summary judgment. The Court denied the latter motion and set the cause for trial. Plaintiff elected to stand by his motion for summary judgment, and appeals from the order of the Court denying same.

Appellant's affidavits filed in support of motion for summary judgment are open to the fundamental objection that they set out four, and arguably five, mutually contradictory statements of alleged facts, three of which are contained in appellant's complaint and incorporated in the Castleman affidavit by reference, the fourth being set out in the affidavit proper, and the fifth being contained in the affidavit of appellant's secretary.

The obvious purpose of the summary judgment procedure is to determine whether an issue exists to be determined by the trier of fact. (Shirley v. Ellis Drier Co., 379 Ill. 105 (1942); Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523 (1939); Gliwa v. Washington Polish Loan & Bldg. Ass'n., 310 Ill. App. 465 (1941)). Clearly, therefore, summary judgment cannot be rendered when the affidavits in support of motion therefor are at issue with themselves.

However, this court is unable to pass upon the merits of the case for the reason that no appealable order appears. This attempted appeal is from an order entered June 6, 1947, as follows:

"This day come the parties hereto by their respective attorneys and this cause coming on to be heard upon the motion of plaintiff for summary judgment and the court having heard the arguments of counsel thereon and being now fully advised, denies the said motion. It is ordered by the Court that this cause be and the same is set for trial Friday June 27, 1947, at 10 o'clock, Daylight Saving Time."

Thereafter, on July 11, 1947, the following was entered:

"And now comes the plaintiff by his attorney and elects to stand by his motion for summary judgment and declares his intention to appeal this case."

An order, to be final and appealable, must contain all the essentials of a judgment. (People v. Chicago, B. & Quincy R. R. Co., 306 Ill. 166) and must settle the rights of the parties. (Orwig v. Conley, 322 Ill. 291). An order granting or denying a motion for judgment notwithstanding the verdict is not appealable because such an order is not a judgment but merely a ruling that the moving party is or is not entitled to a judgment. (LeMenager v. Northwestern Barb Wire Co., 296 Ill. App. 568; Reynolds v. Wangelin, 314 Ill. App. 12). An order dismissing a suit at plaintiff's costs is not final or appealable as it should recite that "plaintiff take nothing by his suit and defendant go hence without day". (Duncan v. National Bank of Decatur, 285 Ill. App. 305). An order denying judgment on the pleadings or summary judgment is not a final order. (Cook v. East Shore Newspapers Inc., 301 Ill. App. 362; Woods v. Village of LaGrange Park, 308 Ill. App. 595). The Appellate Court is bound of its own motion to dismiss appeal from an order not final, even though appellee makes no such motion. (General Electric Co. v. Gellman Mfg. Co., 318 Ill. App. 644; Tilton v. Ludwig, 327 Ill. App. 202; Parker v. Woodward, 325 Ill. App. 624).

As this case now stands at issue ready for trial with no final order having been entered, the appeal is dismissed.

Appeal dismissed.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A.D. 1948.

General No. 9556

Agenda No. 5

FRANCES HOFFMAN,)
Plaintiff-Appellee,)
)
)
-vs-)
)
)
FERNAND G. JENARD,)
Defendant-Appellant.)

Appeal from
Circuit Court,
Tazewell County.

DADY, J.

This is a suit for personal injuries claimed to have been sustained by plaintiff-appellee, Frances Hoffman, as a result

of an automobile collision. Judgment was entered against the defendant-appellant, Fernand V. Jenard for \$15,000 based on the verdict of a jury. The defendant has brought this appeal.

The complaint charged ordinary negligence. No question is raised as to the sufficiency of the pleadings.

The defendant did not introduce or offer any evidence.

The uncontradicted testimony shows that on July 8, 1945, the plaintiff was riding easterly on a State highway as a guest in the front seat of an automobile driven by her friend Lyman Stevens. The Stevens car was at all times on the southerly side of the center line of the pavement and was and had been traveling about 30 or 35 miles per hour. The defendant, accompanied by a lady friend, was also driving his car easterly on the same highway and overtook the Stevens car. In passing the Stevens car the car of the defendant struck the left rear of the Stevens car.

In the collision the left rear tire of the Stevens car was cut, its left rear fender was torn loose, the left rear end of its trunk compartment was caved in, and its left door was sprung so that it could not be opened immediately after the accident.

The plaintiff testified that she was aged 43 years; that in the collision she was thrown forward and partly off the seat and "I caught myself like that (indicating) against the

windshield and I gave my back or my head just a quick jerk forward;" no part of her body struck any part of the automobile; that immediately after the accident she went to her home and about eight o'clock that evening her neck began to hurt; that ten days later she went to a Doctor Stuttle for treatment; that during the interim she felt soreness in her neck and at the end of the day would have a severe ache in her neck; that when she first went to Doctor Stuttle he lifted her head and turned it in every direction and examined the back of her neck with pressure and directed her to come to his office for treatment; at his office she received treatments from an electric machine that produced heat and was massaged after the heat treatments; that such treatments continued until August 23rd, 1945, when Doctor Stuttle put on her a collar made of heavy cardboard to fit her chin and neck, which came up under her jaw and to the back of her neck, so that she could not move her head up or down or to either side; that thereafter she wore that collar at all times for about three or four weeks and during such period slept in it, and it was only taken off about every third day to have her neck cleaned; that thereafter she still wore the collar at times for about two weeks; that he also gave her stretching exercises with a heavy piece of canvas about twelve inches wide; that a slit was made in the center of the canvas so that she could get

her head through the slit, and it would rest under her chin and at the back of her neck, and was tied over a water pipe, and five times each day for fifteen seconds at a time, she suspended herself from such canvas with her feet withdrawn from the floor, and hung there for fifteen seconds with her entire body supported by the canvas; that she continued that exercise until March, 1946, and during such time also had head and massage treatments at home; that since the night of the accident she has never been without soreness or stiffness in the back of the neck, and has suffered pain there most of the time, at times much worse than at other times; that at the time of the trial in November, 1946, she still had soreness and stiffness in her neck, and that if she sat or stood or did anything for any great length of time it caused pain in the back of her neck; that she had to lie down each noon every day for about 45 minutes in order to be able to work; that there was a time in the summer of 1946 when she thought it might be some better, but for the last two months before the trial she had seen no improvement whatever; that before the accident she had never received any injury to or suffered any pain in the region of her neck. She further testified that after the accident she was out of work for eight weeks and then went back part time, and for such eight

weeks received full compensation from her employer; that at the time of the trial her pay was more than it was immediately before the accident, and at the time of the trial she was doing the same work that she did before, that is, bookkeeping, in the same office. At the time of the trial she was working from 7:30 A.M. until 11:30 A.M. and from 1:00 o'clock noon until 5:00 P.M. five days a week, and she has at all times driven her automobile to and from work, except for the first few weeks.

~~H. H. P.~~ ~~W. H. L.~~ testified that he had been an x-ray technician for 17 years; that on July 1, 1946, he took and developed four x-rays of a portion of the body of the plaintiff. These x-rays were admitted in evidence.

Doctor Stuttle testified by way of deposition, that he had practiced orthopedic surgery as a specialty since 1935; that he first gave the plaintiff medical attention on July 16, 1945; at that time he examined her particularly in the neck region with reference to motion of the neck and shoulders and by palpation of the muscles and bony prominences; at that time he felt she had a traumatic peri-arthritis of the cervical vertebrae resulting from some traumatic type of injury; that peri-arthritis means injury of the capsule and ligaments, and it may well be actual tearing or hemorrhaging into or around the joints; that such a condition causes pain; that he prescribed

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a period of rest with heat and heavy massage treatments both at home and at his office, and prescribed sedatives as needed; that on August 23, 1945, he made a removable type collar which would immobilize the neck, and the plaintiff used this collar steadily for four weeks; that he then prescribed a period of night use of the collar and the continuation of heat and massage and the application of head traction, by use of a heavy bandage; that the purpose of such treatment was to create a stretching of the capsule and ligaments and an actual separation of the joint surfaces; that the plaintiff came to his office eighteen times for treatment and was under such treatment until the 1st of July, 1946, and he last saw her on September 30, 1948. He then stated that in his opinion she had as a result of such injury permanent arthritis of the lower cervical vertebrae with some damage to the intervertebral disc within the fourth and fifth cervical bodies, and that such condition was permanent and would produce pain. On cross examination he testified that the condition of the plaintiff that he had described might be caused without trauma, but the loss of space between the fourth and fifth cervical vertebrae is not ordinary without trauma.

The defendant contends that there was no trauma, that the evidence clearly shows she was not injured, and that trauma was

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not proven either by any evidence of abrasion, injury or any other objective facts. Assuming as true the testimony of the plaintiff, it requires no stretch of the imagination for any layman to reasonably believe that ~~xxxx~~ plaintiff could have received a serious and permanent injury to her neck and head by reason of the sudden jolting of the car in which she was riding, regardless of the lack of any abrasions.

After Doctor Stuttle testified that he saw and examined the plaintiff on July 13, 1945, and arrived at the opinion that she had peri-arthritis, he was asked, "Does that sort of condition in your opinion, and based upon reasonable medical certainty in your experience, cause pain?" Objection was overruled and he answered "Yes". It is our opinion that the ruling was correct. (See ^{Chicago & North Western} C. & N.W. R.R. Co. v. Martin, 112 Ill. 16, 18.) Doctor Stuttle was asked if he had an opinion based upon reasonable medical certainty and his experience as to whether or not the plaintiff had sustained any permanent results from this injury. Objection to this question was overruled. It is our opinion that the ruling was correct. (See ^{Chicago & North Western} E. J. & E. Ry. Co. v. Lawlor, 229 Ill. 621; Owens v. Guernsey, 241 Ill. App. 477, 483.) Defendant contends that the court erred in admitting in evidence the four x-rays identified by the witness Whealen. These x-rays were taken and developed and fully

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identified by an experienced technician. It is our opinion they were properly admitted. (See Wicks v. Cuneo-Henneberry Co., 319 Ill. 344. ^{Ill. 306} Stevens v. I.C.R.R.Co., Ill. 370.)

On direct examination Doctor Stuttle did not mention any x-rays whatever. On cross examination he stated it was true that when testifying on direct examination he had had in front of him his own records and an x-ray report from a Doctor Decker, and had referred to such report to refresh his memory as to the exact location of the "narrowness of the disc," but said that his own diagnosis was not at all based upon the report of any other physician with reference to x-rays. He was then asked the following questions and made the following answers:

"Q And you would have to refer to an x-ray of some kind or x-ray findings or your own examination of an x-ray before you could make the diagnosis you said you made in this case, isn't that true?

"A Yes.

"Q You did not take any of the x-rays did you?

"A I did not."

The defendant then moved to exclude "all the testimony of this witness with reference to findings and diagnosis as not based upon the best evidence, no sufficient foundation, but based upon hearsay, therefore incompetent." The court denied

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such motion.

The subject of x-rays was not again mentioned until on re-direct examination Doctor Stuttle was asked the following question and made the following answer:

"Q Doctor, with reference to the x-rays, I will ask you if you examined those x-rays yourself?

"A I examined them myself."

No objection was made to the question, but after the answer was made the defendant moved to exclude the answer. The motion was denied.

At the conclusion of all the evidence the defendant moved the court to strike the testimony of Doctor Stuttle on the ground "that the alleged injury is of a permanent nature on the ground there is no evidence whatsoever proving or tending to prove it as defined by the doctor, and there is no sufficient foundation for the conclusions of the doctor as expressed in his answers." This motion was denied.

Immediately after the jury had retired to consider of their verdict the defendant stated that he did not want the jury "to see the x-rays which had been identified by the witness Whealen and so admitted in evidence," and at the court's direction the x-rays were not permitted to go to the jury on their retirement.

10/10/1918

Dear Sir,

I have the pleasure to acknowledge the receipt of your letter of the 10th inst.

in relation to the above.

I am sorry to hear

that you are unable to

attend the meeting.

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In arguing that the court erred in denying the motion to exclude testimony of Doctor Stuttle, the defendant says that the diagnosis by Doctor Stuttle could only be made by the use of x-ray findings, and that no x-rays were offered in evidence from which Doctor Stuttle made his diagnosis. The defendant refers to the fact that a Doctor Decker, as a witness for the plaintiff, testified that he was a licensed radiologist and in 1945 was requested by Doctor Stuttle to take certain x-rays of the upper dorsal and spine of the plaintiff. Doctor Decker was then shown one x-ray, Plaintiff's Exhibit 1. After some further questions as to the identification of such exhibit it was offered in evidence, but on the defendant's objection such exhibit was not admitted in evidence. No questions were thereafter asked concerning such x-ray. It will be noted that Doctor Stuttle testified that his diagnosis was not at all based on the report of any physician with reference to x-rays. It will also be noted that four x-rays of the plaintiff taken by Doctor Whealen on July 1, 1946, were admitted in evidence. Although the record does not clearly show that such four x-rays were shown to Doctor Stuttle at the time he testified, yet he was asked if he "examined those x-rays," and he said he had. Doctor Whealen testified that on July 2, 1946, the four x-rays which he so took and which were admitted in evidence, were placed in a "view box" and looked at by Doctor Stuttle for about

fifteen minutes. This evidence stands uncontradicted. To be sure Doctor Whealen merely testified that such four x-rays were a "part of the body of the plaintiff", and he was not asked and did not testify as to what particular part of the body. Defendant argues from this that such four x-rays may have been of the legs. We consider it sufficient to say that such exhibits were in evidence during the trial, they spoke for themselves as to the parts of the body covered by the x-rays, counsel, having made no cross examination as to the parts of the body so x-rayed, and having offered no evidence on such subject, cannot now well argue that the x-rays were of any parts other than the parts claimed to have been injured, and cannot now well argue that the x-rays which Doctor Stuttle referred to in his testimony were not the x-rays admitted in evidence, and which Doctor Whealen testified that Doctor Stuttle looked at in a view box for about fifteen minutes.

It is our opinion that the motions to strike the testimony of Doctor Stuttle were properly denied.

The defendant contends that the court erred in denying a motion of the defendant to declare a mistrial.

Lyman Stevens testified as a witness for the plaintiff. After testifying to the collision and while being examined by the plaintiff's attorney the following took place:

"Q Just describe just what happened after the collision. Just tell us what happened?

A Got out of the car and this gentleman (the defendant) walked back and looked at my car and he said, 'You don't have to worry. I am covered by - -' "

MR. KNOBLOCK: (Attorney for plaintiff) Just a minute.

MR. HEYL: (Attorney for defendant) I move to strike that.

MR. KNOBLOCK: Any conversation you had with him don't tell. Just tell where your car was sitting at that moment.

MR. HEYL: Just a minute.

Thereupon, out of the presence of the jury, the defendant moved that a juror be withdrawn and a mistrial declared. After a full hearing the court denied such motion. Thereupon the jury was recalled and the court told the jury: "The court will rule that the answer of the witness be stricken and the jury will disregard the answer."

On such hearing and out of the presence of the jury the defendant showed that prior to the trial the deposition of such witness had been taken with the same counsel present, and that the witness in such deposition was asked the following question by the defendant's attorney and made the following answer:

"Q Did you talk with him (the defendant) any further?

"A I said - he said, 'Don't worry, I'm insured'."

The defendant now contends that because of such facts defendant's counsel deliberately introduced the subject of insurance. On the present trial the defendant made no objection to the question and the question was not at all suggestive of insurance. It was plaintiff's counsel, not counsel for the defendant, that stopped the witness from completing his answer. We do not consider that there is any evidence of improper conduct on the part of plaintiff's counsel in asking the particular question. In Williams v. Consumers Company, 352 Ill. 51, there was a somewhat similar state of facts on the question of insurance. In holding that there was no reversible error shown the court said; "This ruling of the court (denying a mistrial) is alleged to be erroneous, and numerous cases are cited where under different circumstances this court has at times reversed ^a ~~the~~ judgment and remanded the cause where improper remarks and questions of an attorney have been asked a witness with the apparent purpose of informing the jury that an insurance company, rather than the party sued, would be liable for any damages assessed. We have examined these cases, but find none where a mistrial has ever been granted on account of an inadvertent or unresponsive answer of a witness to a legitimate inquiry. Generally, where prejudicial error has been declared it is found to have been due to some misconduct or improper

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remarks or questions of counsel, oftentimes repeated, and calculated to influence or prejudice the jury."

Defendant contends that plaintiff's counsel was guilty of prejudicial misconduct throughout the trial. We do not consider that such criticism is justified.

Defendant next contends that the verdict of the jury was the result of passion and prejudice and so grossly excessive as to be against the manifest weight of the evidence on the question of damages. The testimony of the plaintiff and of Doctor Stuttle above set forth as to the plaintiff's injuries is uncontradicted and is not at all inherently unbelievable. The experienced trial judge heard such evidence and saw the witnesses, and in effect approved the verdict as to the amount of damages. Assuming the testimony introduced by the plaintiff to be true, we feel that we cannot properly say that the verdict is excessive.

Defendant next contends that the court erred in giving the one instruction asked by the plaintiff. The court gave nineteen instructions asked by the defendant. Plaintiff's instruction number one told the jury that if they found for the plaintiff it was the duty of the jury to assess her damages, and in arriving at whatever damages, if any, she might be entitled to the jury had the right to and should take into consideration, if shown by the evidence, the nature and extent of her injuries, if any, as a result of such injury, her pain and suffering, if any,

as a result of such injury, and from all the facts and circumstances in evidence award to the plaintiff such sum as the jury found from the evidence to be reasonable and fair compensation for all damages sustained or which may be sustained by her in the future, if any, as a direct and proximate result of said injury. The criticism of such instruction is that it did not limit the damages to those proved by a preponderance of the evidence. Defendant cites Edwards v. Hill-Thomas Lime Co., 378 Ill. 180, where a similar instruction was criticized but not held reversible error by the Supreme Court. Defendant's given instruction number 9 told the jury that the burden of proof was on the plaintiff, and that she must prove her case by a preponderance of all the evidence before the jury could find for her. Defendant's given instruction number 12 told the jury that the burden was on the plaintiff to prove that any ailment or disability claimed was the direct and proximate result of the collision complained of, and if she failed to do then she would not be entitled to recover any damages for said ailment or disability.

It is our opinion that the giving of plaintiff's instruction number 1 was not reversible error under all the facts and circumstances of the case.

The judgment of the trial court is affirmed.

Affirmed.

Extract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A.D. 1948.

General No. 9559

Agenda No. 8

JOSEPH E. TIGUE, doing business)
as Tigue Motors,)
Plaintiff-Appellee,)
-vs-)
WALTER F. FLANIGAN,)
Defendant-Appellant.)

Appeal from the
Circuit court of
Champaign County,
Illinois.

DADY, J.

This is an action in replevin brought by plaintiff-appellee Joseph E. Tigue, doing business as "Tigue Motors," of Keokuk, Iowa, to recover possession of an automobile. The defendant-appellant Walter F. Flanigan of Champaign, Illinois, filed a counter-claim. A jury

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returned a verdict finding the issues for the defendant and counter-claimant and assessed his damages at \$200. The trial court entered judgment for the plaintiff-appellee notwithstanding the verdict. The defendant-appellant brings this appeal.

The only question raised by the motion for judgment non obstante veredicto was to ascertain whether there was any evidence which, when taken in its aspect most favorable to the defendant, proved or tended to prove the defense set up by defendant. (See Berg v. N.Y.C. & H.R. Co., 391 Ill. 52 and Peters v. Peters, 376 Ill. 237, 241.) Therefore our statement of the facts will cover only such undisputed facts as we consider material and such other evidence as we consider material and most favorable to the defendant.

As we view it, only two questions were at the time of the trial and now are presented: (1) whether the automobile was stolen from the appellee, and, (2) whether the appellee has been estopped from recovering the automobile by reason of delay or inaction on his part.

Appellee is and since 1926 has been a car dealer in Keokuk, Iowa, selling DeSoto and other cars. As such dealer he bought the car in question from the manufacturer for \$1,072.32 and had it on display in his show room for several months immediately prior to August 22, 1946. He contends the car was stolen from such show room on August 22, 1946, and that he did not again see it until he replevined it from the appellant on December 19, 1946.

Appellant lives in Champaign, Illinois. He bought this car on

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November 18, 1946, from L. G. Epstein, a car dealer doing business in Champaign under the name of "Motor Mart", and paid therefor \$2754.

To support his claim of title the appellant offered in evidence the following instruments: (1) A copy of an instrument filed with the Secretary of State of the State of Illinois about August 7, 1946, labeled "Memorandum of Sale", on an Iowa form, purporting to bear the signature of "Joseph R. Tigue," in which Joseph R. Tigue certified he was a registered and licensed dealer and had sold and delivered to R. Ellis Hooks of Macomb, Illinois, the automobile in question. On the bottom of such instrument are the words "Subscribed and sworn to before me this 20th day of July, 1946," and immediately below that is a signature also purporting to be the signature of "Joseph R. Tigue," Notary Public. Imprinted thereon is a notarial seal, reading "Joseph E. Tigue;" (2) A copy of an "Application for Certificate of Title only" filed with such Secretary of State about August 7, 1946, which stated that Hooks acquired such automobile on July 20, 1946, from Joseph R. Tigue of Keokuk, Iowa. Such application stated "This car has not been and will not be operated by applicant. Want title only to assign," and was sworn to by Hooks on August 1, 1946, before a Notary Public; (3) A copy of a Certificate of Title covering such automobile by such Secretary of State to R. Ellis Hooks, dated August 7, 1946; (4) A copy of an "Assignment of Title" filed with such Secretary of State about September 12, 1946, by which Hooks under date of August 31, 1946, assigned such automobile to "Motor Mart", Champaign, Illinois, and on

such assignment there are the following words: "Re-assignment by Dealer," by which, under date of August 31, 1946, the "Motor Mart", as dealer, assigned such automobile to Earle Raymond Mode, of Grayville, Illinois; (5) A copy of an application for "Certificate of Title Only" filed with such Secretary of State about September 12, 1946, signed and sworn to by Earle R. Mode on September 2, 1946, covering such automobile; (6) A copy of a Certificate of Title issued by such Secretary of State under date of September 12, 1946, to Earle R. Mode, covering such automobile; (7) A copy of an assignment dated November 13, 1946, filed with such Secretary of State about November 19, 1946, by which Mode assigned such automobile to such "Motor Mart"; (8) A copy of a re-assignment dated November 18, 1946, filed with such Secretary of State about November 19, 1946, by which the Motor Mart assigned such automobile to the appellant; and (9) A copy of an "Application for Certificate of Title Only" dated November 19, 1946, signed by appellee, filed with such Secretary of State about November 19, 1946, covering such automobile.

Objection by appellee to all of such instruments, except numbers 8 and 9, were sustained as being immaterial. We will, however, consider the case the same as though all of such instruments were admitted in evidence.

Appellee's garage in Keokuk fronts on the main street and runs back about 100 feet to an alley.

James A. Ward testified that he had been an employee of the appellee constantly since 1934; that he left the place of business of appellee

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about 6:00 P.M. on August 22, 1946, and went to his home; that at that time the automobile was near the front of the show room, facing the street; that when he left the doors were locked; that he returned about 7:35 P.M. the same evening and found the car was gone but did not know who took it; that he immediately 'phoned the appellee, and that the police and appellee arrived within a few minutes; that an examination then made showed that entrance had been gained to the garage by forcing a window in the rear, and that the rear door was unlocked from the inside and was open a few inches, and that he heard this Chief of Police then 'phone the Iowa Highway Department and State Highway Patrol to report the theft on the air.

Harry Maas testified that he had been Sheriff of Lee County, where Keokuk is located, for seventeen years; that as such officer he went to appellee's garage on the morning of August 23, 1946; that the Chief of Police had called him the night before to report the theft of the car; that on August 23, 1946, he talked with appellee and examined the window which had been forced with some kind of an instrument, and that he then went to the police station and had the police broadcast the theft.

Appellee testified that he and Ward left his place of business about 6:00 P.M. on August 22, 1946, and the automobile was then there; that later that evening Ward 'phoned him that the car was missing and that he immediately 'phoned the police and then went to the garage and the police arrived about the same time; that they investigated and

found that a window had been forced. He further testified that he never sold the car to any one and did not see it again until the day it was replevined.

Appellee further testified that the garage floor was about six feet lower than the alley; that from the alley a thirty foot ramp led down to the floor of the garage, the bottom of the ramp being about four to five feet lower than the alley; that the only way of exit for such automobile was over such ramp; that the pressure of the tires on the automobile was normal; that there was a slight amount, a few gallons, of gasoline in the car; that he noticed no gas fumes when he returned on the night of August 22nd; that he observed tire marks on the garage floor, and the tracks indicated that the automobile had been turned around and pushed out instead of driven. As to the "Memorandum of Sale" from "Joseph R. Tigue" to "R. Ellis Hooks", appellee testified that he had been a notary for several years, and that in June, 1946, his garage was robbed and his notarial seal was stolen from his desk, together with \$32.00 from the cash register. He further testified that the signatures of "Joseph R. Tigue" on such "Memorandum of Sale" were not his signatures, and he did not put his notarial seal on such instrument. He further testified that he never sold the automobile to any one and did not know who took it from his garage.

Epsteen, a witness for appellant, testified that he bought the car from Hooks and paid about \$1251 for the car; that Hooks was about 23 years of age; that he never saw Hooks before or since the purchase; that Hooks gave his address as general delivery, Macomb, Illinois; that he, Epsteen, sold the car to Mode about August 31, 1946; that

later he bought the car back from Mode, and later sold the car to appellant for \$2754.

N.J. Lee, a witness for appellant, testified that in August, 1946, he was a commanding officer of the Illinois State Highway Police and a friend of Earle R. Mode of Grayville, Illinois, and he knew L. C. Epstein; that Mode was trying to buy a car and he went with Mode to the Motor Mart and Mode bought the car in question from the Motor Mart about August 31st; that about a week later a Mr. Lowe of the F.B.I. at Danville came to Lee's office and told him they were making an investigation as to the car in question; that a day or two later Mode 'phoned the witness that the car had been taken away from him and impounded by the State police until about the middle of October and was then returned to Mode; that he was not present and did not see the car impounded, and that all he knew about it having been impounded was what some one told him.

Clarence Robinson, a witness for appellee, testified that he was a captain of the State police; that he was familiar with the car; that it was purchased by Mode and taken by Mode to Grayville, Illinois; that he was advised through his position that Mode had the car about ten days when the F.B.I. picked it up about the first or second week in September and put it in a garage in Albion, Illinois, where it stayed about ten days and the F.B.I. then released it; that in October, 1946, Mode left on a hunting trip for four or five weeks, and left the keys and title in the hands of the F.B.I., that the car

then remained in Grayville for about a month; that when Mode returned from such hunting trip Mode went to Florida about the last of November.

In rebuttal Ward testified that about September 18th or 20th, 1946, he received a 'phone call from a man who said he was Lieutenant Blades of the Illinois State Police, who then told Ward that the car had been picked up by the F.B.I. the previous night and impounded and placed in a garage at Albion, Illinois; that Blades then told Ward that "we" should wait until we heard from the F.B.I., and that on that day he, Ward, told appellee of such conversation.

In rebuttal appellee testified that about September 18th or 20th Ward told him of such conversation with Lieutenant Blades; that he then consulted a Mr. McNamara, who was an attorney in Keokuk, Iowa, and employed Mr. McNamara to get the car back.

McNamara then testified that in September, 1946, appellee employed him to get the car, that he then corresponded with the F.B.I. in Springfield about the car, and about the end of October learned a man named Mode had bought it; that he then employed a firm of attorneys at Carmi, Illinois to recover the car and directed them to replevin it, but he got no action from such attorneys, so he, McNamara, went to Carmi, on December 18th, 1946 and then learned that appellant had the car in Springfield.

It is our opinion that the title papers offered in evidence by appellant merely show that appellant in good faith purchased the automobile from Epsteen for value, - which is not denied.

It is our opinion that the foregoing evidence clearly shows that the automobile was stolen from the garage of appellee on August 22, 1946, and that there is no evidence showing or tending to show the contrary. Such evidence is undisputed and is not in any way inherently improbable.

On the question of estoppel appellant cites Chapter 121-1/2, Section 23, Ill. Rev. Stats. which provides that, "Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell." Appellant also cites and relies on such cases as National Bond and Investment Co. v. Shirra, 255 Ill. App. 415, which held that, "As a general rule, where the true owner of the property allows another to appear as the owner of or to have full power to dispose of the property, so that a third party is led into dealing with the apparent owner, an estoppel may operate against the true owner which would preclude him from disputing the existence of a title which he has caused or allowed to appear vested in another."

After a careful consideration of all the evidence most favorable to the appellant, it is our opinion that the evidence does not show or tend to show any estoppel as against the appellee. Therefore it is our opinion that the trial court did not err in entering judgment

non obstante verdicto in favor of the appellee.

The judgment appealed from is affirmed.

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1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know if the study was successful in achieving its goals and if the results are consistent with their expectations.

Journal of Management Education 30(6)p.789-804
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Plaintiff Throsett was also killed while in his fire engine
Court of Tarrant County to recover the cost of repairs to his
car resulting from a collision in which his car was struck by
one driven by the defendant, William H. Throsett. Throsett was
approaching a street intersection but was unable to stop his car
of the icy condition of the street and slid into plaintiff's
car. The cause was tried before a jury which returned a verdict
for plaintiff. Defendant has appealed to this court.

It was Defendant's theory of the case in the trial court that he was not guilty of capital murder by the way

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port the collision as an unavoidable accident. If there is evidence in the record to sustain this claim, the trial court refused all of defendant's motions for a judgment of acquittal. This was error. People v. ..., 308 Ill. App. 317; 13 N.E. (2d) 311; 114 Ill. App. 3d 311, 397 Ill. 174; 13 N.E. 3d.

Plaintiff could not show that the evidence was not technically perfect. It is not required that the evidence be perfect while they may not be reliable of the fact that they erroneously wrote the bill of lading.

The judgment of the District Court of Chicago is hereby reversed and the cause remanded to the District Court for trial.

W. V. ...

Abstract

ORIGINAL No. _____

No. _____

30-1-61

1. The first part of the report deals with the general situation of the country. It is a very interesting and informative study of the country's development. The author has done a great deal of research and has collected a large amount of material. The report is well written and is a valuable contribution to the study of the country's development.

2. The second part of the report deals with the economic situation of the country. It is a very interesting and informative study of the country's economic development. The author has done a great deal of research and has collected a large amount of material. The report is well written and is a valuable contribution to the study of the country's economic development.

3. The third part of the report deals with the social situation of the country. It is a very interesting and informative study of the country's social development. The author has done a great deal of research and has collected a large amount of material. The report is well written and is a valuable contribution to the study of the country's social development.



TABLE 1:

Table 1 shows the results of the survey. It is a very interesting and informative study of the country's development. The author has done a great deal of research and has collected a large amount of material. The report is well written and is a valuable contribution to the study of the country's development.

Table 1 shows the results of the survey. It is a very interesting and informative study of the country's development. The author has done a great deal of research and has collected a large amount of material. The report is well written and is a valuable contribution to the study of the country's development.

The author of this report is a very experienced and knowledgeable person. He has done a great deal of research and has collected a large amount of material. The report is well written and is a valuable contribution to the study of the country's development.

seems very likely that the court will find in favor of the defendant's refusal to pay the balance of the purchase price of the suit by plaintiff in the County Court of Orleans County, New York. Defendant filed a counterclaim for the same for profits lost because of the delayed loading. The County Court entered a judgment for plaintiff in the sum of five hundred and forty dollars and found plaintiff not guilty of contributory negligence. Defendant has appealed to the court.

It is admitted that a balance of five hundred and forty dollars was owed plaintiff by the defendant at the time of the late. The principal questions now come on the responsibility of plaintiff for the loading of the machine on the ship.

It appears that the L. O. F. contract "L. O. F." was the floor of the business of the defendant. The defendant authorized plaintiff to collect a fee of \$100.00 per machine loaded, in good condition, and to be paid in the future by plaintiff's employees and the L. O. F. was loaded on the ship by employees of a machinery loading firm which plaintiff hired. When the late arrived in New York the defendant found the machine.

Defendant contends first that plaintiff assumed the responsibility of loading the machine on the ship and was therefore liable for any defects in loading. It is not true that the late was purchased by plaintiff's floor loader. At the time the ship was loaded, plaintiff requested plaintiff to secure a loader and expected to pay for the loading. Plaintiff's loader was not to secure a competent loader; there was no evidence that the firm employed did not have that reputation. There was no agreement that plaintiff was to assume responsibility for the loading of the machine. In the absence of such an agreement, plaintiff's responsibility ended when the machine was delivered to the loader. Ill. Rev. Stat. 1907, Ch. 101, Sec. 4 (1);

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A. D. 1947

FRANK KETTER,
Plaintiff- Appellee

vs

CITY OF HIGHLAND PARK, a
Municipal Corporation, and
P. E. DOLE, City Engineer
and Acting Building
Inspector,
Defendants-Appellants

APPEAL FROM THE
CIRCUIT COURT OF
LAKE COUNTY

Dove, J.

On December 6, 1946 appellee filed his petition in the Circuit Court of Lake County against the city of Highland Park and P. E. Cole as City Engineer and Acting Building Inspector, seeking to compel the issuance of a permit to alter a building on Deerfield Avenue in Highland Park, to be used as a private garage and offices. The defendants answered alleging that certain zoning and other ordinances of the city which are set up in the answer precludes the intended use of the premises. After the issues had been made up a hearing was had before the court without a jury, resulting in a finding that the premises in question have been zoned for business and to refuse the petitioner a permit to construct a garage for the purposes of the maintenance of the offices of the petitioner, and for the repair

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MEMORANDUM FOR THE DIRECTOR

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of his taxicabs and automobiles would be discriminatory and unreasonable and that the use of the garage by the petitioner for his taxicabs does not constitute a public garage within the meaning of the ordinances of the city. Upon these findings the court awarded the writ as prayed and the defendants appeal.

The evidence and stipulations of the parties disclose that appellee is the owner of about eighty taxicabs which are operated under the names of the Highland Park Cab Company, Waukegan Cab Company, Pontiac Cab Company, Shoreline Yellow Cab Company, Glencoe Cab Company and the Skokie Cab Company. The cities and villages in which the cabs are operated extend from Chicago northward along the shores of Lake Michigan. These cabs are rented to the operators on a mileage basis. Appellee cleans and repairs them and each driver is the bailee of the particular car he drives and he purchases the gas which he uses.

The record further discloses that the building which appellee seeks a permit to alter was built in 1915 and was constructed to manufacture ice. In 1929 the ice plant was discontinued and the building has been vacant since that time. Appellee had leased the building prior to applying for a building permit and had contracted to buy the premises contingent upon his receiving such contemplated permit. The building upon the premises involved herein is approximately one hundred feet square and occupies all of the area of the lot except a yard approximately forty feet square. The evidence and stipulations further disclose that appellee intended the building when remodeled to be used for a garage

Citation?

to service his taxicabs and that he now has and is constructing garages in other cities where his taxicabs operate.

Under the zoning ordinances obtaining in the city, at the time of the instant proceeding, this ^{building} ~~proceeding~~ is in a "C" Business District and under this classification garages are generally permitted. A public garage, however, is not permitted within two hundred feet of an "A" or "B" residential district and the property in question is immediately contiguous on all sides to one of such residential districts. Section 33 of the ordinance defines a Public Garage to be "any premises used for housing or care of more than one motor driven vehicle, for hire, or where such vehicles are equipped for operation, repair or kept for remuneration, hire or sale, not including exhibition or show rooms." Section 32 of the zoning ordinance defines a Private Garage as "a building for housing motor driven vehicles, not more than one of which may be the property of persons other than occupants of the premises on which such private garage is located and in "A" and "B" districts, not more than one of which may be a commercial vehicle."

Counsel for appellants state that if the contemplated use of appellees' building comes within the intendment of said section 32 of the zoning code the judgment of the trial court should be affirmed. Appellants contend, however, that the use contemplated was that defined by said section 33 and the reconstruction permit was refused because the contemplated garage was a public garage as so defined by the zoning ordinance.

Counsel for appellee insist that Section 32 of the

[illegible]

Zoning ordinance applies and if not, the city had no zoning ordinance covering this type of garage. Counsel also contend that the application of appellee stated that he sought to use the premises solely for private garage purposes and offices and that appellants had no right to read into the application some other purpose.

The trial court found that the intended use of the premises by appellee for his taxicabs does not constitute a public garage within the meaning of the ordinances of appellant city. We are inclined to agree with this conclusion. This garage was not to be open to the public nor for the use of anyone except appellee. It was not a place where taxicabs would be hired out indiscriminantly to the public nor was it to be used as a station to which the public might go and obtain a cab. The drivers of the cabs will not get them at the garage but at the cab stands and the cabs themselves will only be in the garage when undergoing repairs and the fact that these cabs when in repair will be used for commercial purposes does not, in our opinion, make the building in which they were housed a public garage. Webster defines "public" to mean "open to common or general use, as a public road, a public house."

A motion to dismiss this appeal was made by appellee upon the ground that after this appeal had been perfected appellant city passed a comprehensive zoning ordinance which directly repealed the provisions of the zoning ordinance involved in the instant case and therefore counsel insist that the questions presented by this record are moot.

We do not think so. The right of appellee to use the premises involved herein for the purpose he seeks to use them depends upon the provisions of the zoning ordinance in effect at the time he made his application for a permit. Under the provisions of the new ordinance, provision is made for the continuance of any use lawfully established prior to the passage of the 1947 ordinance. The motion to dismiss the appeal is denied and the judgment of the trial court is affirmed.

Judgment affirmed.

1. The first part of the document is a letter from the President of the United States to the Congress.

2. The second part is a report on the state of the Union, prepared by the President.

3. The third part is a report on the state of the Union, prepared by the President.

4. The fourth part is a report on the state of the Union, prepared by the President.

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10. The tenth part is a report on the state of the Union, prepared by the President.

44179

PEARL A. SMITH, individually and
as Administratrix of the Estate
of Edward C. Smith, deceased,
Appellant,

v.

JAMES J. GORMAN, et al.,
Appellees.

3341A.77
APPEAL FROM SUPERIOR
COURT COOK COUNTY.
102

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for defendants in her action to recover \$2,000, the benefit payable by the defendant labor union on the death of her husband.

At the time of his death the husband was and had been for a number of years a member of the union in good standing. Prior to 1943 the union had been paying death benefits and issuing benefit certificates or cards designating the beneficiary, signed by the member and countersigned by the secretary-treasurer of the local. July 20, 1932 a card designating plaintiff, the wife of Edward C. Smith, as the payee of the benefits payable on his death was issued. This card was delivered to plaintiff and was in her possession at the time of the death of her husband. In 1937 plaintiff and her husband separated and did not again live together as husband and wife. They were not divorced. May 23, 1938 a second benefit card was issued, signed by Edward C. Smith and countersigned by the secretary-treasurer of the union, making the benefits due on the death of Smith payable to Fay Nettler, who, as far as the record shows, was unrelated to Smith. In 1943 the union adopted the first by-laws regulating the payment of death benefits and the issuance of benefit cards. These by-laws provided that "Any member who wishes to change his beneficiary Must First surrender his

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beneficiary card or furnish an affidavit sworn to before a Notary Public attesting to the loss of the beneficiary card to the Secretary-Treasurer who shall then issue two (2) new cards and destroy the original cards in the presence of the member making the request." Smith died February 10, 1945. February 27, 1945 the union paid the death benefit to Fay Nettler.

Plaintiff contends that her possession of the benefit card entitled her to the benefit payable on the death of her husband and that the beneficiary could not be changed without the surrender of the original benefit card or an affidavit by Smith setting up the loss of the original card, and that "where there are no by-laws, rules or regulations adopted by the union, the Illinois Statute ***** (sec.286 Insurance Act, Ill. Rev. Stat. 1947, chap. 73, par. 898) precludes any alleged change of beneficiary by the insured until the union adopts by-laws, rules or regulations for the reason that the Illinois Statute does not confer the right to change the named beneficiary in their absence." Plaintiff cites no authorities, and we have been unable to find any, supporting her contention. The construction asked by plaintiff would make the designation of a beneficiary irrevocable until the adoption of by-laws, etc., contrary to the express intent of the statute that "No beneficiary shall have or obtain any vested interest in the proceeds of any certificate until such certificate has become due and payable in conformity with the provisions of the insurance contract." The case of Delaney v. Delaney, 175 Ill. 187, is decisive of the present case. In that case the deceased designated his wife as his beneficiary. Later he designated another beneficiary without surrendering the former benefit certificate in compliance with the regulations of the society. The Supreme court said (197-198):

"An expectancy, which is the only interest held by the beneficiary prior to the death of the member, is not property, and, therefore, a change of the contract made by the society and the member together could not injure or affect in any way a property interest of the beneficiary. It is true, that, by the terms of the certificate, the change is to be made upon a surrender of the certificate; and that, when the mode of changing the beneficiary is specified in the contract, it must be substantially followed. (Niblack, id. sec. 218). But the parties to the contract may agree between themselves upon a change of the mode of appointing a new beneficiary. The provision, that a new certificate may be issued upon the surrender of the old certificate, is a provision which is made for the benefit of the association, and may, therefore, be waived by the association. It has been held, that the material question is, whether the change of the beneficiary is made by the member with the consent of the society, and that, if it is so made, it is immaterial whether or not the requirements of the by-laws upon that subject have been complied with or not. (Niblack, id. sec. 215). 'A member and the society may during the life of the member waive these requirements, and may agree upon a new beneficiary of the contract in any manner satisfactory to both parties.' (Niblack, id. sec. 222). 'Although the rule is settled that change of beneficiary must be made in the manner prescribed by the laws of the society with some exceptions it is also now equally well settled that the society may waive compliance with the required formalities.' (1 Bacon on Benefit Societies and Life Ins. sec. 208; Splawn v. Chew, 60 Tex. 532; Martin v. Stubbings, *supra*; National Mutual Aid Society v. Lupold, 101 Pa. St. 111)."

Other cases supporting the judgment of the trial court are Grand Legion etc. v. Beaty, 224 Ill. 346, 349; Columbian Circle v. Auslander, 302 Ill. 603, 608; Stake v. Stake, 228 Ill. 630, 632; Benton v. Brotherhood of Railroad Brakemen, 146 Ill. 570; and Voigt v. Kersten, 164 Ill. 314, 320.

Complaint is made that the trial court erred in not requiring defendants to produce all constitutions, revised constitutions, by-laws and minutes of meetings or resolutions pertaining to death benefits to the members, etc. Upon the trial of the case the parties stipulated as to the provisions of the by-laws enacted in 1943 and as to certain customs of the union in respect to the payment of death benefits prior thereto. In view of what we have heretofore held as to the unqualified right of the member to change the beneficiary of his death benefits

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and the right of the union to waive compliance with its regulations and permit the member to designate a new beneficiary, we do not deem it necessary to give further consideration to the denial of plaintiff's motion.

The judgment is affirmed.

AFFIRMED.

Feinberg and O'Connor, JJ., concur.

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44320

RUTH BREADEN,
Appellant,

v.

WALTER KOWALSKI,
Appellee.

APPEAL FROM CIRCUIT COURT
COOK COUNTY.

3341.A.78

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered on a verdict of not guilty in her action for personal injuries.

She was seated in the automobile of her husband, parked on Asbury avenue in the City of Evanston at dusk in June, 1945. Defendant, driving north in Asbury avenue behind a large truck, on being prevented from passing the truck on the left because of an approaching south bound automobile, turned to the right of the truck and struck the rear of the automobile in which plaintiff was seated. Plaintiff's husband having died before the trial, she and the defendant were the only occurrence witnesses. There is a direct conflict in the evidence as to whether the coronary thrombosis, which plaintiff claimed, was the result of the accident.

In the course of the cross-examination of plaintiff, defendant's counsel interrogated her regarding certain difficulties with her husband. On objection by plaintiff's counsel defendant's counsel stated, "I expect to show that worry, experienced on the part of this witness, was a contributing factor to her condition, was the principal factor, and that the worry was caused by an unpleasant marital relationship." Plaintiff's objection was overruled and defendant's counsel was permitted, over further objection by plaintiff, to elicit from her that the difficulties with her husband were quite

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serious, that she employed lawyers to file a suit for separate maintenance, and that she told her physician that she had heard rumors about her husband running around and that she was afraid that her "sickness had caused something since this accident." Defendant also developed that plaintiff was taken to the hospital in 1946 suffering from an overdose of sedatives. She denied, in answer to counsel's question, that this overdose had anything to do with her marital difficulties. Defendant was called for cross-examination under section 60 of the Practice act. He did not testify on his own behalf, and the only witness called in defense was a physician who testified as a medical expert. He was not asked any question by defense counsel as to whether or not worry might or could contribute to the ailments claimed by plaintiff, and no attempt was made by defendant's counsel to connect in any way the marital difficulties of plaintiff with the ailments complained of by her. The cross-examination, properly objected to by plaintiff, might have been quite prejudicial. The facts developed were entirely immaterial and irrelevant to the issues involved in the case unless worry caused by the marital difficulties tended to cause, aggravate or increase the ailments of which plaintiff complained. Defendant, having failed to make this connection, should not be permitted to enjoy the benefits of a verdict thus obtained.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Feinberg and O'Connor, JJ., concur.

44346

MEDICAL CENTER COMMISSION,
A public Corporation,
Appellee,

v.

ABE SOLOWAY & ROSE SOLOWAY,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

104
33-1-1-78²

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants, husband and wife, appeal from a judgment in a forcible detainer action entered against the husband only.

Plaintiff is a public agency created by statute (Ill. Rev. Stat. 1947, chap. 91, pars. 125-135) for the purpose of exercising certain functions connected with the public health, with the power to acquire real property and sell or lease the same, as provided in section 6 (prior to the 1947 amendment), "to any medical or allied educational institution, hospital, dispensary, clinic or church, to be used, subject to the restrictions of this Act, for the purposes stated in Section 4, and for commercial institutions necessary for serving the residents of the District." Defendants conducted a rooming house in the premises involved herein, 722-724 S. Ashland Avenue, Chicago. By proper conveyances and releases plaintiff acquired all their rights as joint owners of premises numbered 724, and lessees of premises numbered 722, title to which plaintiff had obtained from defendants' lessor. As a part of these transactions defendants were permitted to occupy the premises purchased from them until March 31, 1947 at a rental of \$1.00 per month, and thereafter from month to month at a rental of \$65 per month. As to the premises at 722 S. Ashland Avenue, defendants were permitted to remain in possession as tenants from month to month at a rental of \$65 per month,

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payable in advance, commencing February 1, 1947. July 29, 1947, notice of termination of the tenancy on August 31, 1947 was served on defendants. October 2, 1947 the court found "the defendant Abe Soloway guilty of unlawfully withholding from the plaintiff the possession of the premises described in plaintiff's complaint herein and that the right to the possession of said premises is in the plaintiff," and judgment was entered accordingly.

So far as the record before us shows, no disposition was made of the case as to defendant Rose Soloway. However, both defendants appealed. Defendants' objection of a failure to comply with the Federal Housing and Rent Act of 1947 cannot be sustained, because plaintiff as a local public agency is exempted from the act by subdivision (b) of paragraph 5 of section 209. The record shows that defendants were in joint possession of the premises and that action was brought against them jointly. For this reason there should have been a finding and judgment against both defendants. All other objections raised by the defendants are without merit. The judgment is reversed and the cause remanded with directions to enter judgment against both defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

Feinberg and O'Connor, JJ., concur.

44358

CONSUMERS COMPANY, a corpora-
tion,

Appellee,

v.

BELSAN PLASTERING COMPANY, a cor-
poration,

Appellant.

APPEAL FROM CIRCUIT
COURT COOK COUNTY.

3341A.79

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from orders refusing to vacate a judgment by confession entered against it for \$8,939.06 on a note executed by its president, and a later order denying leave to file an amended petition.

The petition to vacate the judgment was based upon the alleged lack of authority of the president to execute the note and power of attorney upon which judgment was confessed. The indebtedness evidenced by the note is not denied. The petition was signed by the secretary of defendant, who in his verification states that the petition "is true to his best knowledge and belief." The amendment to the petition, which defendant was denied leave to file, is based upon information and belief. Neither the petition nor the proposed amendment complies with Rule 26 of the Supreme court governing the vacation of judgments by confession, which requires the petition and affidavits to be made on the personal knowledge of the affiant.

The orders appealed from are affirmed.

ORDERS AFFIRMED.

Feinberg and O'Connor, JJ., concur.

ESTELLE R. FIREBAUGH, THE BOND AND MORTGAGE LIQUIDATION CORPORATION, a Delaware Corporation, IDA WAGNER, ARIEL L. VARGES, CHARLES H. JOHNSON, BARBARA HECHT, MILDRED JONES, SCOVILLE, INC., an Illinois Corporation, WILLIAM C. IWERT, President of Scoville, Inc., IDA WAGNER, Secretary and Treasurer of Scoville, Inc., WILLIAM C. IWERT, RUSSELL FIREBAUGH, IDA WAGNER, CHARLES H. JOHNSON, and JAMES L. SCHMITT, constituting the Directors of Scoville, Inc.,

Appellants,

v.

FRANCIS W. MCGOVERN, JOHN W. GUSKAY, LOUIS E. NELSON, LEON A. MITCHELL; and LOUIS E. NELSON, JOHN W. GUSKAY, WILLIAM A. KESSLER, and FRANCIS W. MCGOVERN, formerly Trustees under that certain Stock Voting Trust Agreement dated October 1, 1937; and JOHN W. GUSKAY, as Depositary under said Stock Voting Trust Agreement; and PAUL F. ANLING, ALVINA ANLING, OTTO PFUNDT, ELLA PFUNDT, and FIRST LA SALLE CO.,

Defendants-Appellees,

and

THE NORTHERN TRUST COMPANY, an Illinois Banking Corporation, and FIRST NATIONAL BANK OF MAYWOOD, a National Banking Association,

Intervenors-Appellees

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT
COOK COUNTY.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order entered on the court's own motion appointing a receiver for the hotel building, the principal asset of Scoville, Inc., an Illinois corporation formed in the reorganization of the 839 Lake Street Building Corporation in the federal court. The plaintiffs are Scoville, Inc. and certain individual and corporate stockholders, owners of more than 51 per cent of the outstanding capital stock, including the individual stockholders alleged to be directors and officers of Scoville, Inc., elected subsequent to the expiration on October 1, 1947 of a voting trust agreement

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entered into pursuant to the plan of reorganization.

The verified complaint alleges the reorganization of 839 Lake Street Building Corporation in the federal court; the creation under the reorganization plan, approved by the court, of Scoville, Inc. to take the assets of the corporation being reorganized; a voting trust agreement which expired by its terms October 1, 1947, also approved by the court; the delivery to plaintiffs on October 24, 1947 of certificates evidencing actual shares of stock in Scoville, Inc. in excess of 51 per cent of its outstanding stock; that on October 28, 1947, pursuant to the terms of the voting trust, plaintiffs, as owners and holders of 51 per cent of the aggregate number of shares of stock outstanding, removed the voting trustees as directors of Scoville, Inc., and thereafter, on November 20, 1947 at a special meeting of the shareholders called by one of the plaintiffs, holding more than 20 per cent of the outstanding capital stock, five of the plaintiffs were elected directors of the corporation; that these newly elected directors elected plaintiff William C. Iwert as president, and plaintiff Ida Wagner as secretary and treasurer of the corporation, and that such plaintiffs are the duly elected, qualified and acting directors and officers of the corporation; that the defendants, formerly voting trustees, directors and officers of the corporation, refused to recognize the plaintiffs as directors and officers of the corporation and are proceeding to act as officers and directors, and unless restrained by order of court will continue to act as directors and will dissipate funds of Scoville, Inc., including about \$8,000 in payment of a pretended, fancied and unfounded claim of the Internal Revenue Department of the United States. The prayer for relief is that the defendants be restrained "from acting, purporting or pretending to act as directors or officers of Scoville, Inc., from holding any pretended directors' meetings, from disbursing or in any way

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dealing with any of the funds of said Scoville, Inc., from intermeddling with the assets of said Scoville, Inc. and the building located at 839 West Lake Street, Oak Park, Illinois, and comprising the principal asset of/^{said} Scoville, Inc."; that the defendant Guskay, the former secretary and treasurer of Scoville, Inc., be ordered and directed to turn over the minute books, stock certificate books, books of account, and all records and all funds of Scoville, Inc. to plaintiff Ida Wagner, secretary and treasurer of Scoville, Inc.; that plaintiffs have such other, further and different relief as equity may require, etc.

Shortly after filing of the complaint The Northern Trust Company of Chicago and the First National Bank of Maywood, depositaries of funds of the corporation, filed petitions asking for instructions as to whose signatures on checks drawn on them should be recognized. The defendants, directors elected by the voting trustees, in their own behalf and also purporting to act on behalf of Scoville, Inc., filed a petition alleging that there is a dispute as to who are the official directors and officers of the corporation; that petitioners have a good and valid defense to the whole of the plaintiffs' complaint (without stating the defense); that it is necessary that the current bills for supplies and services of employees in the operation of the hotel building be paid immediately, and praying that the banks be directed to honor checks on the accounts of the corporation signed by the defendants Nelson and Guskay and that these defendants "be directed to issue such checks only for the operation of the said hotel building and the payment of costs of operation thereof, until the further order of court." This petition was verified by defendant Guskay as "true in substance and in fact to the best of his knowledge and belief." Plaintiffs filed an answer to defendants' petition, denying the authority of defendants to act as officers and directors of the corporation, and the

relief sought in the foregoing petition. This answer was sworn to by one of the plaintiffs, who stated in his affidavit that "the allegations of said answer are true in substance and in fact." No answer to the complaint was filed prior to the entry of the order now before us. An answer subsequently filed, included in an additional record, is immaterial on this appeal and is ignored by us. Bauer v. Lindgren, 279 Ill. App. 397, 406.

On the hearing before the court on these various petitions the court heard the statements of counsel but refused to permit plaintiffs to introduce any evidence, and, over protest of plaintiffs, entered an order reciting that the cause, "coming on to be heard on the petition of Scoville, Inc., a corporation, Louis E. Nelson and John W. Guskay, President and Secretary, respectively, also directors Francis W. McGovern and William A. Kessler, for an order directing the banks to honor checks on the account of Scoville, Inc., to be signed by Nelson and Guskay, and it appearing to the court that the plaintiffs claimed to have elected another purported board of directors and other purported officers, and that as a consequence of the conflict of authority the banks "will not honor checks signed by the petitioning officers of said Scoville, Inc.," and "it being the opinion of the Court that the best interests of all parties will best be served by the appointment of a receiver until the final adjudication of the rights of the parties hereto is determined by this Court, that this property should be preserved, on the Court's own motion-- It is hereby ordered, adjudged and decreed that" Laura M. Bicknell be appointed receiver of the premises at 839 West Lake Street, Oak Park, Illinois, with the usual powers of a receiver in chancery, to collect the rents, issues and profits accruing from said premises, etc.; that no checks by either group of officers be honored by the banks until

the further order of the court.

The petitions of the banks were continued generally.

X The order appealed from was entered upon a petition verified on information and belief and denied by an answer sworn to be true "in substance and in fact." The petition contained no statement of facts justifying the action of the court. Defendants concede that "they did not file any affirmative pleadings which could be the basis of the appointment of a receiver." There is neither allegation nor proof in the record supporting the action of the court. The unanswered verified complaint alleges that there is a duly elected and qualified board of directors and officers ready and willing to carry on the business of the corporation. The effect of appointing a receiver for the principal asset of the corporation was to place the operation and conduct of the corporation's business in the hands of the receiver. The court was without jurisdiction to enter this order. Steenrod v. Gross Co., 334 Ill. 362, 368-369; Wiedoeft v. Frank Holton & Co., 294 Ill. App. 118, 129. It also erred in acting without a verified pleading (Van Ness v. Arado, 257 Ill. App. 56, 59), and without proof of the facts relied upon. Klass v. Yawitch, 302 Ill. App. 229, 234.

The order is reversed.

REVERSED.

Feinberg and O'Connor, JJ., concur.

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MARY A. YOUNG,
Appellant,

v.

KNICKERBOCKER HOTEL CO., a
corporation,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

3341A. 80

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action against defendant for personal injuries sustained by plaintiff while a guest at defendant's hotel. Upon a trial with a jury a verdict for \$10,000 was returned in favor of plaintiff. A motion for a new trial by defendant was denied, but defendant's motion for judgment notwithstanding the verdict was sustained and judgment entered accordingly, from which plaintiff appeals.

On June 15, 1944, plaintiff and her sister registered at defendant's hotel and were assigned to a room. The room had a bath tub with shower attachment. Various valve controls on the wall, shown in photographs contained in the record, control the hot and cold water for a tub bath and a separate control for the hot and cold water for the shower.

It appears that on the morning of June 17 plaintiff, then 73 years of age, filled the tub for her bath. After finishing her bath she allowed the water to run out of the tub and while getting out of the tub, in some way unexplained by her, hot water and steam started to pour out of the shower spout over the bath tub. She called for help, and her sister shut off the shower and assisted her out of the tub. She sustained first and second degree burns on the back, chest and abdomen, second and third degree burns of the buttocks, especially the left, and the entire left thigh and portions of the left

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lower leg. The burned area covered about 40% of her body. Plaintiff was rushed to the hospital on the morning of the injury. She was in shock from 24 to 48 hours and in a semi-comatose condition for 3 or 4 days. Several skin graftings had to be applied over the injured areas. She was finally discharged from the hospital June, 1945, after 52 weeks of confinement.

It appears that the hot water system in the basement of the hotel was under complete control of the defendant; that the system had a thermostat control intended to keep the hot water below 160 degrees Fahrenheit; that at least on two occasions prior to the day of the accident defendant's engineer saw the thermometer as high as 190 degrees, and that about the time of the accident he admits the temperature was 180 degrees.

The judgment notwithstanding the verdict raises the question as to whether there was any evidence tending to prove negligence on the part of the defendant, or whether the plaintiff, as a matter of law, could be said to be guilty of such contributory negligence as to bar her right of recovery. If there was any evidence upon which a jury could find defendant guilty of the negligence charged, it was the duty of the court to submit the case to the jury. Neering v. Ill. Cent. R. R. Co., 383 Ill. 366; Gnat v. Richardson, 378 Ill. 626. If, after verdict, the trial court could say upon the entire record that the verdict is against the preponderance or manifest weight of the evidence, it had the power to grant a new trial. Neering v. Ill. Cent. R. R. Co.

In the instant case the trial court denied the motion for a new trial, and upon this appeal defendant has expressly waived any question as to the propriety of this ruling. It is clear to us that the heating system being entirely under the control of defendant, it owed a duty to its guests to see that the thermostat control was in proper working order, or that the water for the use by the guests was not heated to a temperature that would

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result in burning and scalding to the extent experienced by plaintiff. Cottmire v. 181 East Lake Shore Drive Hotel Corp., 330 Ill. App. 549, 555; Brooks v. Utah Hotel Co. 108 Utah 220. In Rice v. Warner Hotel Co., 201 Ill. App. 530, it was said "that the very circumstances surrounding the relationship of innkeeper and guest impose upon the former a duty to use a very high degree of care to secure the safety of the latter". Parsons v. Dwightstate Co., 301 Mass, 324, 17 N. E. 2d, 197. Even if plaintiff had turned on the hot water valve leading to the shower spout, she had a right to assume that the water was not heated to a boiling point that would burn and scald her. We cannot say as a matter of law that plaintiff, under all the circumstances shown, was guilty of contributory negligence which directly and proximately caused her injury. It was for the jury under all of the facts and circumstances to determine that question. Petro v. Hines, 299 Ill. 236 at p.240; Wintersteen v. National Cooperage Co., 361 Ill. 95.

The trial court erred in entering judgment notwithstanding the verdict, and since defendant, as stated, has waived all questions respecting the propriety of the court's ruling on the motion for a new trial, it follows that the judgment of the trial court must be reversed and the cause remanded with directions to enter judgment on the verdict in favor of plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer, P. J., and O'Connor, J., concur.

EDMOND I. EGER, et al.,
Appellees,

V.

ILLINOIS PROTESTANT CHILDREN'S HOME,
INC., an Illinois Corporation,
Appellant,

and

CITY OF CHICAGO, a Municipal Corporation,
Defendant.

Appeal from
Interlocutory
Order of
Superior Court
of Cook County.

33451

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an interlocutory injunctive order in favor of complainants and against defendant.

The application for the injunction was based upon the sworn complaint and the sworn answer of the defendant. The complaint alleges that each of the complainants owns and occupies property as a family residence, the description of each parcel being set forth in the complaint. It is alleged that defendant has bought the premises at 5017-23 Ellis Avenue, Chicago, adjacent to the premises owned and occupied by plaintiffs, not more than 500 feet therefrom; that defendant's premises are improved with a three story brick residence, designed to be used and occupied as a one family residence; that defendant has made plans to use said premises as a children's home or orphanage in violation of the Zoning Ordinance and the Building Code of Chicago; the Zoning Ordinance prohibits the use of said premises of defendant for other than a family residence. It is charged that the operation of said premises as an orphanage will seriously interfere with the peaceful use and occupation of complainants' property and seriously affect their value.

The answer of defendant admits the existence of the ordinances in question; that it purchased said property and intended to use it as an orphanage, but only with the permission of the Zoning Board and the granting by it of a variation of the Zoning Ordinance; and that it intends to apply to said Zoning Board for such variation.

The granting of a temporary injunction under such circumstances rests in the sound discretion of the chancellor. Lincoln Trust & Savings Bank v. Nelson, 261 Ill. App. 370; McDougall v. Woods, 247 Ill. App. 170. In the light of the admissions made by the answer, it is apparent there was no serious harm to the rights of the defendant, nor does the injunction prevent the defendant from pursuing its intention to apply to the Zoning Board for such variation. In McDougall v. Woods, at page 174, the court said:

"The primary purpose of the statute is to permit a review of the exercise of the discretion lodged in the chancellor with the purpose of determining whether the interlocutory order probably was necessary to maintain the status quo and preserve the equitable rights of the parties."

The order of the Superior Court is affirmed.

AFFIRMED.

Niemeyer, P. J., and O'Connor, J., concur.

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JOHN T. DEMPSEY, Administrator with the
Will Annexed in the Estate of Anton M.
Simonsen, alias Anthon M. Simonsen,
Deceased,

Appellee,

v.

MARIAN PATRICIA HASS, et al.,
Appellees,

NIELS PEDERSEN,

Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

John T. Dempsey, Administrator with the Will Annexed of the Estate of Anton M. Simonsen, deceased, filed a complaint in chancery against the defendants to construe the will of the deceased. The case was heard by the chancellor, a decree entered, and the defendant Niels Pedersen appeals.

The record discloses that on January 4, 1934 Anthon M. Simonsen executed his last will and testament. He died on the 9th day of August, 1945, and his will was admitted to probate by the Probate Court of Cook County on November 23, 1945. The will consists of two pages and was written by the testator entirely in longhand. On the first page testator stated "I Bequeath", and this was followed with thirty bequests aggregating \$33,000.00.

Five of the bequests are as follows:

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| | or Residue | |
| Mrs. John Johnson/ Akely, Pennsylv. R. F. D. #2, Box 53 | Aunt | 1,000 |
| | or Residue | |
| Mr. Niels Pedersen/ Mo. Valley, Iowa | Uncle | 1,000 |
| Mrs. C. S. Bull, 2816 Winthrop Rd. Shaker Heights, Ohio | | 2,000 |
| | Freind or Residue | |
| Mrs. Florence E. P. Strandberg, Jr. all Bric. a Brack | | 2,000 |
| 1111 Hyde Park Blvd. | Friend or her Girls | |
| Mr. A. Daugaard, Inspektor, the old Peoples home | Friend or Residue | |
| Aldetdomsljemet, Hassevismeg, Aalborg. | | 1,000 |

On page two of the will the testator stated:

"3 If estate goes up or down the amounts bequeted goes up or down in the same proportions to each other as the amounts indicate.

** * *

"6 A list of my stocks is in folder lower left desk drawer along with Bills for same for income tax purpose
Burn all papers and letters.

"Am worth above \$100,000".

On the hearing one of counsel for plaintiff testified, "The former statement that estate was something in the neighborhood of \$100,000.00 was incorrect. After disbursements it is in the neighborhood of \$130,000.00."

On the hearing the only bequests that were involved were the five above mentioned and apparently the controlling question was whether those five, or any of them, would be entitled to the residue of the estate after the payment of the specific bequests, and on this appeal the only party questioning the correctness of the decree is Niels Pedersen, hereinafter referred to as the defendant.

The chancellor held that paragraph 3 on page 2 of the will which stated "If estate goes up or down the amounts bequeted goes up or down in the same proportions to each other as the amounts indicate", was controlling. We think this ruling of the chancellor must be affirmed. Papa v. Papa, et al., 377 Ill. 316, where the court announces the law applicable to the construction of wills, and, continuing, said (p. 320): "Where one construction of a will renders a portion of it meaningless and another gives effect to all the words used, the latter should be adopted. (Walker v. Walker, 283 Ill. 11.) Where there is an irreconcilable repugnancy between two clauses in a will, the latter must prevail as being the last expression of the testator's intent (Liesman v. Liesman, 331 Ill. 287) ****". Paragraph 3 on page 2 of the will, being

1. The first part of the report is devoted to a general description of the project and its objectives. It also includes a brief review of the literature on the subject.

2. The second part of the report describes the methodology used in the study. This includes a detailed description of the experimental design and the data collection procedures.

3. The third part of the report presents the results of the study. This includes a detailed description of the data and the statistical analysis used to interpret the results.

4. The fourth part of the report discusses the implications of the findings and provides recommendations for future research. It also includes a conclusion and a list of references.

5. The fifth part of the report is a summary of the findings and a list of references. It also includes a conclusion and a list of references.

6. The sixth part of the report is a summary of the findings and a list of references. It also includes a conclusion and a list of references.

7. The seventh part of the report is a summary of the findings and a list of references. It also includes a conclusion and a list of references.

8. The eighth part of the report is a summary of the findings and a list of references. It also includes a conclusion and a list of references.

9. The ninth part of the report is a summary of the findings and a list of references. It also includes a conclusion and a list of references.

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irreconcilable with the five specific bequests, one of which provides in substance the bequest of \$1,000 to the defendant Pedersen "or Residue", and being the later provision, it must prevail.

The decree of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED.

Niemeyer, P. J., and Feinberg, J., concur.

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• *Staphylococcus aureus* (Staph aureus)

$$f(x) = \frac{1}{x^2} = x^{-2} \Rightarrow f'(x) = -2x^{-3} = -\frac{2}{x^3}$$

IVAN HARRIS,
Appellant,

v.

NORWALK TRUCKING COMPANY,
Appellee.

APPEAL FROM SUPERIOR COURT
COOK COUNTY.

33411 2

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

December 3, 1946 plaintiff filed a complaint at law against the Norwalk Trucking Company to recover damages for personal injuries sustained by him on the 8th of July, 1941 on account of the claimed negligence of the defendant.

The accident happened at State and 63rd streets in Chicago. It was alleged that the defendant owned and possessed a motor truck which was being driven south in State Street by an agent of the defendant; that the defendant was incorporated under the laws of Ohio and was operating a fleet of motor trucks carrying freight between various points in the State of Ohio and the State of Illinois and other states;

"4. That on the 3rd day of December, 1945 action was heretofore filed on the plaintiff's behalf against the defendant herein and was dismissed upon motion of defendant as an involuntary dismissal.

"5. Plaintiff further alleges that this suit is being instituted within one year from date of said involuntary dismissal as made and provided for in such case."

Then follows allegations of the negligent acts of the defendant.

The record further discloses that summons was issued commanding the defendant to appear on January 6, or on January 20, 1947, and shows it was served on the defendant by leaving a copy with an agent of the defendant.

On January 6th defendant by his counsel filed an appearance

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The following information was obtained from

the records of the Federal Bureau of Investigation

concerning the activities of the subject during

the period from January 1, 1942, to January 1, 1943.

The subject was born on January 1, 1900, at

Chicago, Illinois, and is a resident of Chicago.

The subject was employed by the Federal Bureau of Investigation

as a Special Agent in Charge from January 1, 1942, to

January 1, 1943, and was assigned to the New York

Office during that period. The subject was also assigned

to the Chicago Office during that period.

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from which it appears that "Wevhereby enter our appearance of The Norwalk Trucking Company herein sued as Norwalk Trucking Company". After the record was filed in this court, pursuant to notice served on counsel for plaintiff, photostatic copy of the appearance was filed which shows that "We hereby enter our appearance for The Norwalk Truck Lines Company herein sued as Norwalk Trucking Company", dated January 6, 1947. On January 6th the defendant "The Norwalk Truck Lines Company" filed a written motion to strike and dismiss the suit on the grounds that:

"1. The allegations of the complaint affirmatively show that plaintiff's action is barred by the Statute of Limitations.

"2. The allegations of Paragraphs 4 and 5 are conclusions of the pleader and fail to set forth ultimate facts."

Afterwards, on January 30, 1947, plaintiff served a notice to set for hearing the motion to strike the complaint, and on May 23rd the court entered an order, on motion of attorneys for defendant "to strike the complaint and to dismiss the suit and the court having heard arguments of counsel: It is hereby ordered that defendants motion to strike the complaint be and is hereby sustained and defendants motion to dismiss be and is hereby sustained and this suit is hereby dismissed without costs, all costs having been paid." It is from this order that plaintiff prosecutes this appeal.

Counsel for plaintiff contend that suit was brought against the "Norwalk Trucking Company" and not "The Norwalk Truck Lines Company", and they had no "right to interlope in this case". We think the argument is entirely without merit. It has always been the practice that, where a defendant has been wrongly named, defendant should give the defendant's correct name so as to avoid any unnecessary delay.

One of the grounds of defendant's motion to strike the complaint and dismiss the suit was that the complaint affirm-

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atively showed the action was barred by the Statute of Limitations. This was a matter that was before the court, and we think the motion to strike was properly sustained. Paragraph 15, section 14 of the act of 1872 and paragraph 25, section 2 of the act of 1873, chapter 83, Illinois Revised Statutes, 1937, provide:

Par. 15, sec. 14: "Actions for damages for an injury to the person, * * * shall be commenced within two years next after the cause of action accrued."

Par. 25, sec. 2: "In any of the actions specified in any of the sections of said act, if judgment shall be given for the plaintiff, and the same be reversed by writ of error, or upon appeal; or if a verdict pass for the plaintiff, and, upon mattera alleged in arrest of judgment * * * or, if the plaintiff be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after."

Paragraph 25, section 2 of the act of 1873 is identical with Section 24 of the Limitations Act, (Chapter 83, Ill. Rev. Stat., 1947.)

The complaint alleges that plaintiff was injured on the 8th of July, 1941, in Chicago. That on the 3rd day of December, 1945, plaintiff theretofore filed an action against the defendant which was dismissed on motion of the defendant -- as an involuntary dismissal, from which it appears that plaintiff did not bring his suit until more than four years after he was injured, and this was not saved by afterwards bringing a suit on December 3, 1946. The complaint was vulnerable to the defense of the Statute of Limitations.

The judgment of the Superior Court of Cook County dismissing the suit is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, P. J., and Feinberg, J., concur.

LOUIS RICHMAN and MAX RICHMAN,
Appellees,

v.

LOUIS M. MARCH, FANNY GILBERT,
MILTON GILBERT and NORMAN
GILBERT,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

3317A 3

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action in forcible detainer against the defendants to recover the third floor apartment at 4825 North Sawyer Avenue, Chicago, Illinois. The case was tried before the court without a jury, and there was a finding and judgment in plaintiffs' favor. Defendants appeal.

The record discloses that the building in which the apartment involved is located was owned by Morris Palman from 1939 to 1942, when he sold it to Bernstein who later sold it to Spierer, and the latter sold it to plaintiffs, Louis and Max Richman, in 1945. That in March, 1940, the defendant Louis March was a tenant occupying the apartment under a lease from the then owner, Morris Palman. The lease covered the period of apparently one year, but it is not in the record. March was in continual occupancy of the apartment when the building was sold to plaintiffs in February, 1945, but as far as the record discloses, there was no written lease since the one which was executed in 1940. On April 23, 1946, March, desiring a new written lease with plaintiffs, prepared a lease in duplicate and tendered them to the Richmans for consideration. The Richmans took the two documents, kept them, and then prepared duplicate originals of a new lease of their own in which Paragraph 3 provided: "Said premises shall not be occupied in whole or in part by any person other than Lessee, and Lessee

shall not sublet the same or any part thereof, nor assign this lease, nor permit to take place by any act or default of himself or any person, any transfer by operation of Law of Lessee's interest created hereby; nor offer for lease or sublease the said premises, nor any portion thereof, without, in each case, the consent in writing of Lessor", and tendered them to March for his consideration. March likewise kept the two documents but they could not agree and no lease became operative, but March continued to occupy the apartment and continued to pay the rent as before.

The evidence further shows that on June 16, 1947 plaintiff served a written notice on the defendant March that, "pursuant to United States of America, Housing Expediter" and the laws of Illinois with reference to March's tenancy of the apartment, he was notified "to cure your violations of the provisions of your tenancy of said premises, which violations consist of your subletting and assigning said premises to other persons, contrary to the terms and provisions of your tenancy"; that, unless he did so, his tenancy would "be terminated and we shall proceed against you by law to recover the possession thereof." Four days later, viz., June 20, 1947, the plaintiffs served March with another notice advising him that, "pursuant to United States of America Office of Housing Expediter * * * and the laws of the State of Illinois," his tenancy of the apartment, because he had failed and neglected to cure the violations of the provisions of his tenancy, "which violations consist of your subletting and assigning said premises to other persons, contrary to the terms and provisions thereof, I have elected to determine and terminate your tenancy", and he was notified to quit and deliver up the apartment on July 1, 1947. The rent for the month of June was paid.

It further appears the apartment was occupied by Louis

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March, his wife, his wife's mother, the defendant Fanny Gilbert, and Mrs. Gilbert's two sons, Milton and Norman, although the latter was most of the time in the United States Army; that on June 1, 1947 the defendant Louis M. March and his wife moved from the apartment to 2300 Arthur Avenue, Chicago, although there is some evidence to the effect that March left some of his personal effects in the apartment.

It is plaintiffs' contention that this was a violation of the terms of the lease dated April 23, 1946 between plaintiff Louis Richman and the defendant Louis M. March. This is obviously unsound for it is admitted this document was not executed by Louis Richman.

Counsel for plaintiff, in stating plaintiffs' theory of the case, says "Plaintiffs' theory was that the apartment in question was rented under a written lease to Louis M. March several years ago by a former owner of the property; upon the expiration of said written lease the said Louis M. March continued in possession of said apartment as a hold-over tenant from year to year; that thereafter, on April 23, 1946, plaintiffs, the new owners of the property, entered into a written lease for the said apartment with the said Louis M. March; that subsequently on June 1, 1947, the said Louis M. March moved from the apartment taking up residence elsewhere and leaving his mother-in-law and two brothers-in-law, the Gilberts, in possession of the said apartment in question; that thereby, and because he either assigned or sublet said apartment to his mother-in-law and two brothers-in-law, the said Louis M. March violated the terms of his tenancy, and he, having ignored plaintiffs' notice to cease and desist in and to cure such violations, the plaintiffs rightfully terminated their tenancy by notice."

The difficulty with this contention is that plaintiff

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Max Richman testified, when called under Section 60 of the Civil Practice Act, "I saw the lease under which Mr. March and Mrs. Gilbert were in possession of the apartment. I do not have the lease with me. I think the lease run from Mr. Sapera. I made no new lease subsequent to that time for this apartment with anyone. * * * I don't believe Mr. March has any lease. We gave him a month to month tenancy."

It is the law that where a tenant occupies premises under a lease for a term of a year or more and he continues to occupy them after the termination of the lease, he is held to be a tenant from year to year. But that is not the law where the parties are negotiating for a new lease and the tenant continues to occupy the premises after the termination of the period covered by the lease and no agreement has been reached. In such case the law creates a tenancy from month to month.

Schilling v. Klein, 41 Ill. App. 209.

Since the alleged lease of April 23, 1946 was not executed and since plaintiffs' action is based on the violation of this document the judgment cannot stand. For the reasons stated the judgment of the Municipal Court of Chicago is reversed.

JUDGMENT REVERSED.

Niemeyer, P. J., and Feinberg, J., concur.

to be a good, honest, and true man.

He is a good, honest, and true man.

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44171

EDWARD C. KIESLER,
Appellee,

v.

JOSEPH B. KIESLER, GEORGE W.
KIESLER, FRANK E. KIESLER,
ELIZABETH KIESLER and MARIAN
B. KIESLER,
Appellants.

APPEAL FROM CIRCUIT COURT
COOK COUNTY.

33414 04

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of specific performance of an alleged written contract of sale of defendants' shares of stock in two family-owned corporations - an operating company and a building corporation in which title to the real estate occupied by the operating company was vested.

At the beginning of the controversy culminating in the decree, all stock in the two corporations was owned by four brothers, two sisters and the spouses of some of them. Dissension having arisen, the stockholders were divided into two factions consisting of plaintiff, his wife, his sisters and their husbands on one side, and the remaining three brothers and the wives of two of them in opposition. During the pendency of the suit for specific performance plaintiff bought the stock of the sisters and their husbands. For convenience the plaintiff, and his three brothers as defendants, will be treated as the sole parties in interest.

Much litigation followed the controversy between the brothers, including several suits in chancery, an embezzlement charge against one of the brothers and a police court action. The business necessarily suffered. On August 29, 1944 attorneys for the plaintiff wrote the attorneys for defendants reciting a recent offer by defendants to sell their stock holdings in

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the operating company to plaintiff at \$150 a share, or in the alternative to purchase plaintiff's stock at the same price, and stating, "...no satisfactory conclusion will ever be reached in this matter unless and until a concrete proposition is reduced to writing and signed by all of the parties, including our client, and an escrow is created to preclude the possibility of last minute changes of mind and cancellations." The writers also suggested that the building corporation stock be disposed of in the same transaction and that defendants fix a value on the stock and that the offer to sell or purchase the building corporation stock be made on other than a cash basis. On September 11, 1944 attorneys for defendants replied to the letter of August 29th, offering to enter into an escrow agreement as to the stock of the operating company at \$150 per share, and as to the building corporation at \$70 per share, all payable in cash except that \$8,500 of the purchase price of the building corporation may be paid in the form of a first and prior mortgage payable in installments within three years; that plaintiff be given the privilege of purchasing the stock deposited by the defendants within five days, and in the event of his failure to exercise the privilege, that defendants shall have the option within five days thereafter to purchase the stock deposited by plaintiff at the prices mentioned above. On September 20, 1944 attorneys for plaintiff wrote attorneys for defendants stating, "...the purchase or sale proposition which we have been discussing so frequently and which is set out in your letter of September 11, 1944, addressed to us, has been accepted by our clients," and concluding as follows: "We sincerely hope that you will be able to furnish us with the statement of the financial status of this corporation which you promised us and that this escrow can be properly and completely set up within the next few days or at least before you leave Chicago on Monday, as you stated you might." On the next day, September 21, 1944,

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attorneys for plaintiff again wrote attorneys for defendants, expressing astonishment that one of the attorneys for defendants had stated over the phone that attorneys for plaintiff were mistaken in regard to being promised a statement of the financial status of the operating company, and stating, "Your unconscionable demand just made to us over the phone, that our client Edward C. Kiesler purchase the stock of Joseph, Frank and George Kiesler, both in the operating company, and in the building corporation, for a total price of \$63,500, of which sum \$60,000 is to be cash, without even revealing to him or to us what the condition of the corporation is at the present time, is hereby accepted." Appended to this letter was the following confirmation, subscribed by the plaintiff: "I have just learned that, today, upon receipt of my formal written acceptance of the offer of sale or purchase made to me by my three brothers through your firm, you phoned my attorneys and stated that your clients now ~~refuse~~ to consummate the deal by the escrow method outlined in your own letter of September 11, 1944, and also they refuse to submit any financial statement. *** I therefore accept the offer of outright sale as set out in the above letter, and desire that the transfer be effected at once." Defendants having failed to deliver their stock for sale to plaintiff, he filed a complaint for specific performance to which he attached as exhibits the four letters referred to above, alleged a binding contract on behalf of defendants to sell and on his part to purchase, and a tender by him of the purchase price. After their motions to strike the complaint had been overruled, defendants answered, evidence was taken before a master, who filed a report finding the issues in favor of plaintiff and recommending a decree of specific performance. Objections and exceptions to the report were overruled and the decree entered. This appeal followed.

Plaintiff contends "that a binding contract of sale resulted from the negotiations between the parties. Such contract was the result of three letters. First a letter written by Glenn Paxton, an attorney for defendants, dated September 11, 1944 containing an express offer of sale. *** Thereafter, two letters were written by Glynn J. Elliott, attorney for the plaintiff, dated September 20 and September 21, 1944, respectively, which it/^{is}contended constituted an unequivocal acceptance, and the three letters taken together constitute the contract. The conversations between the attorneys and the respective parties as testified to in the record merely throw light on the negotiations.... The conversations do not form a part of the contract which resulted solely from the written communications between the parties." Defendants insist that there never was a meeting of the minds of the parties - merely preliminary negotiations looking forward to an escrow agreement, and that if an agreement was effected by the last letter of September 21, 1944, it was repugnant to the Statute of Frauds (Ill. Rev. Stat. 1945, chap. 121 1/2 sec. 4) and therefore not enforceable. The letter of plaintiff of August 29, 1944 plainly contemplated a final written agreement signed by all of the parties: that is, the owners of the stock involved in the sale. Defendants' letter of September 11, 1944, for the first time fixed the value of the stock in the building corporation and the terms upon which it would be sold, and contemplated an escrow under which all the stock in both corporations was to be deposited, the plaintiff to be given the privilege of purchasing within five days, with a like privilege to the defendants within five days thereafter if plaintiff failed to exercise his option. Neither plaintiff nor defendants were obligated to buy. Plaintiff's letter of September 20th accepted the terms of defendants' letter of the 11th, but requested a statement of the financial status of the operating company and the setting up of a proper escrow to make the transaction binding

on all the parties. This escrow was never set up, and according to plaintiff's letter of September 21st, defendants' attorneys refused to furnish a financial statement and demanded an unequivocal undertaking by the plaintiff to buy the stock of the defendants. Thereupon plaintiff, waiving whatever rights he had to insist upon an escrow upon the terms and conditions of the letters of September 11th and September 20th, advised defendants by letter dated September 21st that "Your unconscionable demand just made to us over the phone, that our client Edward C. Kiesler purchase the stock of Joseph, Frank, and George Kiesler, both in the operating company, and in the building corporation, for a total price of \$68,500, *** is hereby accepted," and attached thereto a confirmation subscribed by him, heretofore quoted, wherein he says, "I therefore accept the offer of outright sale as set out in the above letter..." It is apparent from the express language of this letter and the confirmation attached thereto that for the first time the plaintiff was obligating himself to buy the stock of the defendants, and that this obligation was an acceptance of the "unconscionable demand just made to us over the phone" by attorneys for defendants. This agreement to buy was a departure from the agreements specified in prior letters whereby plaintiff merely agreed to deposit his stock in escrow in consideration of the option to buy the stock of the defendants, leaving him under no obligation to make the purchase. Plaintiff's obligation under the new arrangement rested upon his acceptance of defendants' proposition transmitted over the phone. Neither this proposition nor any memorandum thereof was ever reduced to writing, signed by defendants or their agent, and it was unenforceable. Section 4, entitled Frauds (Ill. Rev. Stat. 1945, chap. 121 1/2, Uniform Sales Act) provides:

"(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or

1. The first step in the process of the development of a new product is the identification of a market need. This is often done through market research, which can be conducted in a variety of ways, including surveys, focus groups, and interviews. The goal is to understand what customers want and need, and to identify any gaps in the current market.

chooses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

Plaintiff therefore was not entitled to enforce specific performance. Holsz v. Stephen, 362 Ill. 527; Weber v. Adler, 311 Ill. 547; Wright v. Raftree, 181 Ill. 464.

The decree is reversed.

REVERSED.

Feinberg, J., concurs.
O'Connor, J., took no part.

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MARY MARINO, Administratrix of the
Estate of Richard Marino, Deceased,
Appellee,

v.

OTTO NACOVOSKY and A. J. ORLANDO,
Appellants.

APPEAL FROM SUPERIOR
COURT COOK COUNTY.

3341A-105

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants, owner and driver of the automobile which struck the decedent, appeal from a judgment of \$5,000 rendered in an action based on the wrongful death of decedent.

The facts show that on Saturday, February 9, 1946, in the forenoon, Mary Marino, administratrix of the estate of the decedent, with her two children, the decedent, age 5, and James, age 7, visited a friend at 1539 Flournoy street in Chicago, Ill. This address is on the south side of the street opposite a school yard on the north side; that defendant Nacovosky, an employee of defendant Orlando, the owner of the truck, drove east on Flournoy street, striking the decedent in the middle of the street and so injuring him that he died immediately thereafter. The only eye witness to the accident was the driver, who was called for cross-examination and testified that he had turned into Flournoy street from the west and did not see decedent until after the impact of the automobile with him, and that he had not seen any children playing in the street. He admitted signing a contradictory statement in the police station on the afternoon of the accident, in which he said, "I saw a number of people playing on the street on the north side of Flournoy and I continued, and one of the boys started to cross the street from the north to the south, and the left fender of my car

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struck this boy and the left front wheel ran over him." He also signed a statement to the like effect for the then attorneys for the plaintiff about a week after the accident.

The record shows that the next of kin of the decedent are his father, mother and surviving brother, and defendants contend that plaintiff failed to show exercise of due care for the safety of the decedent by the father and mother. The evidence shows affirmatively and without contradiction that the mother took the two boys with her to visit the friend on Flournoy street; that she started to leave with the children, when, remembering that she had forgotten something, she returned to the apartment of her friend; the children went on, saying they would meet her at the school yard; while the mother was in the apartment the boy met with the accident. Whether she was negligent in permitting the children to go down on the street unattended was a question of fact for the jury. Isley v. McClandish, 299 Ill. App. 564.

There is no merit in defendants' claim that affirmative evidence should have been produced that the father was not negligent, as the evidence shows conclusively that the children were then in the sole care and custody of the mother. The question of the negligence of the defendants in the operation of the automobile - no horn having been sounded and no steps taken to stop the car until after the impact - was likewise a question of fact for the jury.

Counsel for defendants further insist that the court erred in refusing to permit them to withdraw as attorneys for the driver upon discovery of the fact that he had signed a statement for plaintiff's attorney which was inconsistent with his testimony on the trial. This was a matter resting in the discretion of the trial court. The statement given to plaintiff's counsel was not substantially different from that given to the police on the day of the accident, of which defendants' counsel

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are chargeable with knowledge. They therefore entered upon the trial of the case knowing that the driver had signed the statement inconsistent with the testimony given on the trial. There was no abuse of discretion in denying leave of counsel to withdraw.

Objection is made to the giving of an instruction at plaintiff's request directing a verdict of guilty if the jury found from a preponderance of the evidence that the driver negligently failed to do certain things, "provided such negligence is alleged in the complaint, as explained in these instructions, and proven by a preponderance of the evidence." No instruction was given setting out the charges of negligence alleged in the complaint. The instruction therefore should not have been given. However, defendants by two of the instructions given on their behalf were guilty of the same error and therefore are not in a position to complain. Kelly v. Chicago City Ry. Co., 283 Ill. 640; Lerette v. Director General of Railroads, 306 Ill. 348.

The judgment is affirmed.

AFFIRMED.

Feinberg, J., concurs.
O'Connër, J., took no part.

44349

GEORGE T. HARZ,
Appellant,

v.

CITY OF CHICAGO, et al.,
Appellees.

APPEAL FROM SUPERIOR COURT
COOK COUNTY.

3341A.106

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order dismissing his complaint seeking to enjoin the enforcement of an ordinance of the City of Chicago authorizing the delivery, to reputable institutions of learning, hospitals or allied institutes, of unclaimed impounded dogs to be used in a "humane manner for the good of mankind and the increase of knowledge relating to the cause, prevention, control, and cure of disease..."

The complaint, which is unduly verbose and argumentative, alleges that the plaintiff is a property owner and pays taxes to the City of Chicago, County of Cook, and State of Illinois; that he resides in the City of Chicago where he has practiced his profession of medicine and surgery for many years. There is no allegation that he was the owner of any dog so disposed of by the city authorities, nor is there any allegation as to special injury sustained by the plaintiff, except the following: "It is not necessary for plaintiffs to show that they have suffered any special injury not common to the public generally, the Ordinance being invalid, and all acts of the defendants under said ordinance are illegal and are injurious per se. The plaintiff has suffered financial loss in the disposal of animals by the defendant under said invalid Ordinance, causing needless expense to the citizens of Chicago, and great mental anguish by being unlawfully deprived of their property." The ordinance in question has been declared valid by the Appellate Court of

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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25 JUL 1972

6. *Chlorophyll a* and *Chlorophyll b* contents were determined by the method of Lichtenthal and Whistler (1973).

Journal of Interpersonal Violence 26(10)

DATE: 25 FEB 1968

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to your staff and to the public. We need a good solution in a short time.

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this District in Illinois Anti-Vivisection Society, et al. v. City of Chicago, 289 Ill. App. 391. It has been repeatedly held that, in the absence of special injury to the plaintiff, only the people can complain of the enforcement of an invalid ordinance or the misuse or waste of public property. Koehler v. Century of Progress, 354 Ill. 347; City of Paxton v. Fitzsimmons, 253 Ill. 355; Kerfoot v. People, 51 Ill. App. 409.

The judgment is affirmed.

AFFIRMED.

Feinberg, J., concurs.
O'Connor, J., took no part.

The first part of the paper is devoted to a study of the properties of the function $f(x)$ defined by the equation $f(x) = \int_0^x f(t) dt$. It is shown that $f(x)$ is a constant function, and its value is determined by the initial condition $f(0) = 1$. The second part of the paper is devoted to a study of the properties of the function $g(x)$ defined by the equation $g(x) = \int_0^x g(t) dt$. It is shown that $g(x)$ is a constant function, and its value is determined by the initial condition $g(0) = 1$. The third part of the paper is devoted to a study of the properties of the function $h(x)$ defined by the equation $h(x) = \int_0^x h(t) dt$. It is shown that $h(x)$ is a constant function, and its value is determined by the initial condition $h(0) = 1$.

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44333

ALLIED CREDIT SERVICE,
Appellant,

v.

THEODORE POLCYN,
Defendant,

DAN S. ZEHR and NELLIE J. ZEHR,
Garnishees-Appellees,

DEAN S. ZEHR,
Adverse Claimant-Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

33-1-A-106²

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment of the Municipal Court in favor of the garnishees in an action of garnishment. From facts stipulated and documents received in evidence upon the trial, it appears that the garnishees, doing business at Gibson City, Illinois, sold a truck to the defendant on March 4, 1947, and upon receiving two checks from defendant in payment, delivered the car and a certificate of title issued by the Secretary of State, duly endorsed; that the two checks given by defendant, one dated March 4, 1947, for \$500, payable to Dan S. Zehr & Sons, and one for \$2250, dated March 5, 1947, to the same payee, were found to be worthless and returned by the drawee bank unpaid. It was stipulated that Dean Zehr is one and the same person as Dan Zehr, and that the garnishees relied upon the false representations of defendant that he was actively engaged in the dairy business in Colfax, Illinois.

On March 6, 1947, defendant, having possession of the truck, obtained a loan from plaintiff and gave plaintiff a note secured by a chattel mortgage on the truck. The chattel mortgage was not recorded, and plaintiff, later discovering that defendant was a fugitive from justice, obtained judgment by confession on the note in the Municipal Court on April 3, 1947.

Journal of Management Studies, 19(1), 67-80.

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1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know if the study was successful in achieving its objectives and if the results are consistent with their expectations.

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It appears that on or about March 16, 1947, the garnishees, the vendors of the truck, repossessed themselves of the truck before the judgment was obtained by plaintiff. It is upon the judgment obtained by plaintiff and execution returned nulla bona that this garnishment was instituted. The garnishees filed an answer in which they denied that they had any credits, property or funds belonging to defendant judgment debtor, and specifically denied that they had any truck belonging to the judgment debtor.

Upon this state of the record it is clear that the judgment debtor fraudulently obtained possession of the truck from the vendors, the garnishees, by giving the two worthless checks. The only issue presented in the garnishment proceeding was whether at the time of the bringing of the garnishment suit, the garnishees had any money, property or credits belonging to the defendant judgment debtor. Schneider v. Autoist Mutual Ins. Co., 346 Ill. 137; Wilt v. Hartman Trunk Co., 215 Ill. App. 182. If defendant had no claim or right of action against the garnishees, then plaintiff, as judgment creditor, would have no right of action against the garnishees. Schneider v. Autoist Mutual Ins. Co.

The judgment of the Municipal Court is correct and accordingly is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, P. J., concurs.
O'Connor, J., took no part.

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Library of Theology
Theology of the student

ARTHUR HEUN, et al.,
Appellants,

v.

THE NORTHERN TRUST COMPANY, etc.,
et al.,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

334 I.A. 107

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed their complaint in the Circuit Court of Cook County, praying for the construction of the provisions in paragraphs 1 and 4 of the last will and testament of Arthur Heun, deceased, and for the allowance to plaintiffs of their costs and expenses, including attorneys' fees for bringing the action, to be paid out of the residuary estate. Defendants filed their written motion to strike the complaint. Upon a hearing a decree was entered dismissing the complaint for want of equity and directing the payment of \$4800 as attorneys' fees to complainants. From the decree dismissing the complaint for want of equity plaintiffs prosecute this appeal, and defendants prosecute the cross-appeal from that portion of the decree which allows attorneys' fees.

The testator died June 20, 1946. His last will and testament is dated December 17, 1936. It appears that the total estate at the time of testator's death was valued at approximately \$881,000, and the residuary estate at approximately \$313,000.

Paragraph 1 of section 31 of said will reads:

"All the rest, residue and remainder of my estate, real, personal and mixed, of every kind and nature and wheresoever situate, of which I may die seized or possessed, or to which I may be entitled at the time of my decease (including any and all legacies and bequests hereinbefore in this my Will set forth, which may have lapsed or failed by reason of the death of the legatee prior to my decease), I give unto the Northern Trust Company of the City of Chicago, and Alan Loeb, as trustees, to have and to hold the same upon the trusts and for the uses and purposes herein-

after expressed."

Paragraph 4 of said section provides:

"The income from the Trust Estate shall be allowed to accumulate and shall be reinvested in order to increase the principal thereof and on the first day of July, 1944, the trust hereby created shall terminate and the Trustees, after deducting their expenses and reasonable compensation, shall thereupon transfer, pay over, deliver and convey said trust estate with all of its accumulations to the then living grandchildren of my dear friends, Albert H. Loeb and Anna Loeb (meaning and intending the children born in lawful wedlock to the three sons of Albert H. and Anna Loeb), in equal shares, as the absolute property of such grandchildren."

Other provisions in the will make substantial bequests to each of the plaintiffs.

Plaintiffs contend that the provision in paragraph 4 which reads, "and on the first day of July, 1944, the trust hereby created shall terminate," made the property involved in the residuary estate intestate property and descends to the heirs, since the deceased did not die until after the date for the termination of the trust, and because the trust terminated by its own limitation before the will took effect upon the death of the testator, there could be no distribution as directed.

It will be seen from the language employed, and it is clear to us, that the estate created by the testamentary trust vested. It was not contingent. Clearly, it was the intention of the testator in the event he died before July 1, 1944, that the trust should terminate on the latter date and the estate be distributed to the legatees named in said provision. This intention is fortified by the language of paragraph 1, which bequeaths the property he owns and possesses at the time of his death, and not on the 1st day of July, 1944, and the direction to distribute such property that he may own and possess at the time of his death to the legatees named in paragraph 4 is without limitation or qualification. We regard the holdings in

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Martin v. McCune, 318 Ill. 585, and Elliott v. Brintlinger, 376 Ill. 147, as decisive of this question.

In Martin v. McCune, the estate devised in the testamentary trust was to be distributed upon Marguerite McCune becoming 18 years of age. The testator in that case could well have put in the date of the 18th birthday of Marguerite McCune, and we would then have the precise situation in the instant case. In that case the court held the estate vested and the devisees entitled to the estate even though Marguerite McCune became 18 years of age before the death of the testator. We do not regard the language in the instant case as ambiguous, and it does not require construction.

The McCune case was decided in 1925 and the Brintlinger case in 1941, long before this complaint was filed, which should have removed any doubt as to the meaning of the language of the will in the instant case. Therefore, the chancellor was correct in dismissing the bill for want of equity. Having dismissed the bill for want of equity, the legal effect was to adjudicate that there was no need for construing the will. Therefore, the findings contained in the decree must be regarded as surplusage. Indeed, it has been repeatedly held that where a decree dismisses a complaint for want of equity, findings of fact or unnecessary recitals have no proper place in a decree.

In Masonic Frat. Temple Ass'n. v. Breitung, 131 Ill. App. 194, this court said:

"Everything else but the actual ordering part of the decree is immaterial, and surplusage. The other findings do not support the decree and have no proper place therein. They in no manner justify the ordering part of the decree, which is the purpose of the findings."

In Hyde Park Invest. Co. v. Hyde Park State Bank, 257 Ill. App. 539, it is said:

"Findings of fact have no place in a decree dismissing a bill **** for want of equity."

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To the same effect State Bank of Chicago v. Christensen, 195 Ill. App. 496, and Lazarus v. Allied Finishing Specialities Co., 316 Ill. App. 667.

In the light of the conclusions reached, it necessarily follows that the decree allowing solicitors' fees was improper under these circumstances. We must, therefore, reverse that portion of the decree which makes the allowance for solicitors' fees. The decree dismissing the complaint for want of equity is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

Niemeyer, P. J., concurs.
O'Connor, J., took no part.

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44370

J. DAVIS,
Appellee,

v.
IDA MURISSET,
Appellant.

332-107
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.
120

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in a forcible detainer action awarding to plaintiff possession of the apartment occupied by defendant.

Defendant had been in possession of the premises since 1938 and at the time proceedings were brought against her was paying a rental of \$35 per month. This rent was always paid in currency up to August 1947. On September 3rd plaintiff served a 5-days notice on defendant and testified that the rent then due was \$70. The 5-days notice was not received in evidence but defendant admitted receiving it and no objection was raised to the failure to produce the written notice. After the service of notice defendant's counsel sent a registered letter to plaintiff in an envelope bearing his name and address. Plaintiff refused to receive the letter and it was returned to sender unopened. Another registered letter from defendant's counsel was later sent to plaintiff, but it was refused and returned unopened. Defendant's counsel testified that the first letter, mailed on September 4th or 5th, contained ^{his} check for \$70 payable to plaintiff. Defendant contends that this constituted a valid tender of the amount due and that the judgment should be reversed. There is no evidence in the record that plaintiff knew the contents of this letter. There is, therefore, nothing to indicate that plaintiff had any knowledge that the rent admittedly due was being tendered by defendant's counsel in the form of his

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check or in cash. Plaintiff was under no obligation to receive the registered letter. The defense of tender of payment is not sustained.

Defendant further contends that she was precluded from completing her case and offering all her evidence. The record does not sustain this contention. Defendant was placed on the witness stand and testified to receipt of the 5-days notice, and that she then went to her counsel's office. Notwithstanding the objections to a lawyer active in the trial of a case testifying as a witness, repeatedly stated by the Supreme court, counsel then took the witness stand and testified to the preparation and mailing of registered letters to plaintiff, none of which were accepted by her. He then called Mrs. Davis for cross-examination, and after a colloquy between court and counsel and a statement by the court that both sides had rested, counsel for defendant stated that he had not rested and that he was asking for judgment for the defendant on the ground that rent has been paid. He at no time offered further evidence, and there is nothing in the record to indicate that anything further was available to defendant.

The judgment is affirmed.

AFFIRMED.

Feinberg, J., concurs.
O'Connor, J., took no part.

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February Term, A.D. 1948.

Agenda No. 11

Defendant-Appellant.

Appeal from the City
Court of the City
of Mattoon, Coles
County, Illinois.

DADY, J.

The only question presented by this appeal is whether the trial court erred in awarding the custody of Joyce Livingston,

The first part of the paper is devoted to a discussion of the general principles of the theory of the structure of the atom. It is shown that the structure of the atom is determined by the laws of quantum mechanics, which are based on the principle of the uncertainty of the position and momentum of the particles. The second part of the paper is devoted to a discussion of the experimental results obtained in the study of the structure of the atom. It is shown that the experimental results are in good agreement with the theoretical predictions of quantum mechanics. The third part of the paper is devoted to a discussion of the applications of the theory of the structure of the atom. It is shown that the theory of the structure of the atom has many important applications in the fields of physics, chemistry, and biology.

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The author wishes to express his appreciation to the National Science Foundation for the support of this work. He also wishes to express his appreciation to the many colleagues who have helped him in the course of this work.

a girl aged five years, to her father Lawson Livingston, who is the plaintiff-appellee, instead of to her mother Sylvia Livingston, who is the defendant-appellant.

The plaintiff and defendant were married on February 9, 1942. Only the one child was born to them. On March 8, 1947, the plaintiff obtained a decree of divorce on the ground of desertion, the decree finding that such desertion took place on February 25, 1946. No complaint is made as to the propriety of such decree of divorce.

By the decree of divorce the trial court reserved for further hearing and decision the question of the custody of the child.

On April 11, 1947, a full hearing was had on the question of such custody. Both parties appeared in person and by their ~~witnesses~~ ^{attorneys} and testified. Thereupon, on such last date, the trial court ordered that the custody of the child be awarded to the plaintiff and that the defendant have the right of visitation of the child and temporary custody of the child for a period of one week every two months, except when the child attains school age, and thereafter one week in June and one week in August of each year.

The plaintiff and other witnesses testified to facts which, if true, showed or tended to show that the defendant was not a fit and proper person to have the custody of the child. The

defendant and other witnesses testified to facts which, if true, showed or tended to show that the plaintiff was not a fit and proper person to have such custody. All of the other witnesses were closely related to the plaintiff or the defendant by blood or marriage.

We consider the foregoing to be a sufficient statement of the material facts.

Plaintiff, over objection, was permitted to testify merely that some man told him that the defendant was living with another man in Indiana. Such testimony was incompetent. This is the ^{only} ruling complained of as to the admission or rejection of testimony and in view of all the evidence we do not consider such error material. Moreover it is presumed that the trial judge in making his findings considered only the material and competent evidence. (Reinhardt v. Security ^{Insurance} ~~Trust~~ Co., 321 Ill. App. 324.) In cases of this character the controlling question was, what was for the best interests of the child. (Umlauf v. Umlauf, 128 Ill. 373.) In the instant case the material testimony is so conflicting that we feel we should follow the rule of law that the findings of the trial judge will not be disturbed on appeal when he saw and heard the witnesses testify, unless such findings are against the manifest weight of the evidence. (Elsasser v. Miller, 383 Ill. 243.)

After a careful consideration of all the evidence we feel that we cannot properly say that the trial court's findings and rulings were against the manifest weight of the evidence.

Therefore the judgment of the trial court appealed from is affirmed.

Affirmed.

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APPELLATE COURT OF ILLINOIS

Second District

October Term, A.D. 1947

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|---------------------------|---|-------------------|
| HAL F. GREEF, |) | Appeal from |
| Plaintiff-Appellee, |) | The Circuit Court |
| vs |) | LaSalle County |
| MIDLAND LUMBER COMPANY, a |) | Hon. Roy Wilhelm, |
| Corporation, |) | Judge Presiding. |
| Defendant-Appellant. |) | |

Bristow, J.

33-1.A. 261²

This is an appeal from a decree of the Circuit Court of LaSalle County wherein the appellee was decreed to have due him from appellant \$1425 and costs.

The complaint in this case set forth that the appellant was an Illinois Corporation engaged in the operation of several retail lumber yards; that one of such establishments was located in the City of Belvidere, Illinois; that, on April 6, 1940, appellant made a written proposition to appellee offering to sell him all of the assets of the Belvidere yard with certain exceptions for the sum of \$10,000 plus the inventoried value of the stock in trade at wholesale replacement cost; that said contract further provided that appellant would accept the stock in the appellant company, the Midland Lumber Company, which was held by appellee at the rate of twenty dollars per share; and, that in pursuance thereto, appellee endorsed certificates aggregating ninety-five shares and paid the balance in cash.

The complaint further alleges that if it developed from a liquidation of appellant's corporation, which was at that time in process, that the stock was worth more than \$20 per share, then the

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appellee was to be paid whatever the ninety-five shares of stock was worth over and above the twenty dollars per share. It is this portion of the sale contract that gave rise to the present controversy. Furthermore, the complaint sought an accounting and restraining order. The cause was referred to the Master in Chancery who reported a finding which was confirmed by the Chancellor, and the decree heretofore indicated was entered. This appeal followed.

Appellant contends that it is not indebted to appellee because of the following facts: the resolution for liquidation of appellant's company was passed in November, 1938; the sale of the Belvidere yard to appellee was a part of that program of dissolution; but on June 18, 1941, a resolution was adopted rescinding the resolution of 1938 and directing the officers of the corporation to discontinue liquidation; it was not until 1944 that liquidation was resumed; and the contract sued upon only contemplated what was being done under the resolution of 1938.

There seems to be very little disagreement on the facts. A written stipulation was entered into between the parties at the time of the hearings and discloses the following: "The language of the part of the selling agreement in question reads as follows: "...It is further understood and agreed that while the seller is taking stock aforesaid at \$20.00 per share, that when presently the business of Midland Lumber Co. shall have been completely liquidated, the holders of title to the shares so turned in shall participate in final distribution to such an extent as the value of the stock exceeds \$20.00 per share." A resolution was passed on June 18, 1941 whereby the liquidation resolution of 1938 was rescinded, and liquidation was discontinued until April 4, 1944. On October 22, 1941, the secretary of appellant company wrote appellee the following letter: "We are carrying an item of contingent liability on our records to cover any difference that there might have been between the \$20.00 allowed you for the stock which

you turned in as partial payment of the purchase of the Belvidere yard and the final liquidation value of the stock." Later on March 10, 1942, O.S.Hitchner, president of appellant company, wrote a letter to appellee which was as follows: "We did agree to pay you any difference between the \$20 per share allowed you, and final liquidation value of your shares, providing that value was more than \$20.00. Unfortunately no time limit was set on this contract, nor was any provision made for the failure to liquidate." Again on May 25, 1943, the same person wrote Karl D. Greef, brother of appellee, the following: "No provision is contained in the contract as to time when liquidation of the business should be completed. That all interested were in good faith to the effect that the business would be liquidated as speedily as possible, I presume not anyone will question."

It seems very clear from the reading of the above letters, that appellant never understood that there was any time limit when the liquidation should occur. The appellee ceased to be a stockholder in appellant company when he turned in his shares of stock. He had no voice in the decision which the board of directors made in 1941 when they determined that it was wise that they postpone liquidation. Whatever was said at that meeting or whatever might have been their motives in changing their plans is immaterial. Certainly, it would be inequitable for them to be permitted to defeat, by their own action, any right or possibility of profit or revenue that appellee might enjoy from the portion of the contract under controversy.

Appellant strenuously insists that the use of the word "presently" in the selling agreement under consideration would not remotely mean any liquidation that would take place four years later. The appellant prepared the document, and, if there is any ambiguity involved, it must be construed more favourably to the appellee. The process of liquidation was exclusively within the power and control of the corporation.

There is some testimony that appellant did not continue to sell their yards because the market was disadvantageous. If they had sold early in 1941 and the market was poor, both appellee and appellant would have suffered a financial loss, but certainly the officers of the company owning vastly larger interests would have suffered the greater loss. Their business judgment evidently prompted them to wait. Their decision was a wise one. There was declared between 1941 and 1944 several dividends. However there is nothing in the record that indicates what the value of the stock was in 1941.

The appellee was induced to buy the property in question and take twenty dollars per share for his stock with the clear understanding that if a liquidation disclosed that it was worth more, he should receive the difference. The final liquidation revealed that appellee was entitled to fifteen dollars per share in excess of his twenty, and certainly the fact that the corporation delayed the sales of its property a few years, should not defeat the appellee's rights under the agreement of purchase. The chancellor was correct in his determination and his decree will be affirmed.

JUDGMENT AFFIRMED

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and changed the case from divorce to separate maintenance, that the parties were living separate and apart, so we find no merit in the contention of the appellee that the record does not show that the parties were living separate and apart at the time the original complaint for a divorce was filed.

Courts of review are always reluctant to set aside a finding of a trial court, and will not do so, unless from a careful review of the evidence they come to the conclusion that the decree is manifestly against the weight of the evidence. In the present case, we are of the opinion that the finding of the trial court is against the manifest weight of the evidence, and that the Court erred in not granting the appellant separate maintenance. The decree appealed from is hereby reversed, and the cause remanded.

Reversed and remanded.

October Term, A. D. 1947
Gen. No. 10195

SMITH BUILDING CO., a corporation,
Defendant-Appellee.

Appeal from
Circuit Court,
Winnebago County,
Hon. William R. Dusher,
Judge Presiding.

334 I.A. 2621

From the record, it appears that on March 15, 1945 plaintiff was employed as a clerk by the B. F. McClelland Insurance Agency whose offices were located on the 6th floor of the Smith Building. About 9:30 A. M. plaintiff started from her office at the northeast corner of the building toward the women's rest room situated in the adjoining corridor just west of the southeast corner of the building. She was wearing walking shoes with rubber heels, and proceeded at a normal gait. Some 20 feet from the intersection

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where the north-south hallway meets the east-west corridor, she spoke to a Mr. Carlson, who was entering his office at the south-east corner of the building, and when she reached the corner she brushed against a Mr. Matteson, who was coming from the west corridor. Her feet slipped, and she fell on the floor. She was assisted into the barber shop some 20 feet down the west corridor; a doctor was called; and she was taken to a hospital in an ambulance.

Examination revealed that she had sustained a fracture of the right femur, and she was confined for approximately 2 months in the hospital, followed by a lengthy period of care and treatment at home. Further surgery will be necessary to remove the Smith-Peterson nail inserted to effect proper healing of the fracture.

The evidence with reference to the care and condition of the corridor where plaintiff fell is controverted. It was composed of 8-inch rubber tiles, and the building maintenance superintendant testified that the floor was last waxed some time in October, 1944, some 5 months prior to plaintiff's fall, with grade no. 1 carnauba wax. He further stated that the janitor was directed to clean and polish the floor every night by mopping it with clear water, and polishing it with a machine consisting of a tampico fiber 19-inch brush. However, he did not know how long the polishing machine was used, or whether the janitor put wax in the water. In that connection, one of the tenants, who testified on behalf of plaintiff, stated that while he was in the basement he saw the janitor on several occasions put something in the water used in mopping the floors. He also stated that he had previously complained to the superintendant about the slippery hallways, and, that on March 15, 1945, the floor was more slippery and dangerous than on other days. The building superintendant, however, maintained that the floor on that date was the same as it always was, and the cleaning woman employed by defendant testified that she examined the area immediately after plaintiff's fall, and found no substance on the floor. Plaintiff's employer, B. F. McClelland, testifying on behalf of

plaintiff, stated that the floor was very slippery, and objection was sustained to the question propounded to him, as to whether anyone else had fallen.

On the basis of the foregoing evidence, the jury returned a verdict of \$5000 in favor of plaintiff. The circuit court, however, granted defendant's motions for judgment notwithstanding the verdict, and for a new trial. The judgment of the court and the reasons therefor are set forth in a written opinion in which the court predicated its conclusions primarily on the ground that plaintiff was contributorily negligent, and that her colliding with Mr. Matteson constituted an independent intervening cause which relieved defendant of any liability even if it were negligent in the maintenance of the corridors.

It is the opinion of this court that the issues of contributory negligence and proximate and intervening cause are not material to the determination of the rights of the parties in this case. The evidence indicated that plaintiff and Mr. Matteson did not collide, in fact, the witness Matteson specifically denied such an inference in his testimony. Furthermore, the casual brushing against a person at a corridor intersection is a foreseeable hazard which would not break the chain of causation if it were shown that defendant was derelict in its duty to keep the corridors of the office building in a reasonably safe condition for tenants. Shoninger Co. v. Mann, 219 Ill. 242; Murphy v. Ill. State Trust Co., 375 Ill. 310. The sole issue, therefore, is whether there is evidence sufficient to establish that defendant was negligent.

The only evidence of defendant's alleged negligence adduced by plaintiff consisted of her statement that the floor on the date she fell was very slippery; and the statements by a tenant that the floor was more slippery than on other days, that he had previously complained to the building superintendant about the slippery condition of the floor, and that while in the basement of the building he had occasionally seen the janitor pour something into the water for cleaning the hallway floors.

In addition thereto, plaintiff submits that evidence of negligence can be inferred from the superintendant's admission that the 6th floor janitor was not a very good one, and that he had access in the basement to the supply room where the wax was kept; and from the presumption created by defendant's failure to call the janitor to testify.

The Illinois courts, as well as those in the majority of jurisdictions, have held that the mere waxing or oiling of a floor is not negligence per se, and that it must appear that the oiling or waxing had been improperly executed in order to impose liability. Mack v. Women's Club of Aurora, 303 Ill. App. 217; 100 A. L. R. 748; 45 Corpus Juris 866; J. C. Penney Co. v. Robinson, 193 N.E. 40; 128 Ohio St. 626; Smith v. Union Trust Co., 121 Conn. 369, 185 A. 81; Ilgenfritz v. Mo. Power & Light Co., 340 Mo. 648, 101 S.W. (2d) 723.

In the Mack case, supra, plaintiff contended that defendant was negligent in having the floor of a club room waxed so that it was slippery, dangerous and unsafe. The Appellate Court reversed a judgment for plaintiff and promulgated the general rule applicable to this category of cases. At page 220 the court stated: "The waxing of floors of this character is a common practice and too well known to be considered negligence in the absence of evidence tending to prove some positive negligent act or omission on the part of the owner of the premises which contributed to the injury We do not consider it was negligence per se for appellant to have the clubroom floor cleaned and waxed, nor that such act served to charge appellant with the duty of anticipating that one in the exercise of ordinary care would be exposed to danger when using the floor in a manner for which it was intended."

Plaintiff herein seeks to distinguish the facts of the cases cited on the ground that in the instant case evidence of some positive negligent act was submitted.

Clearly the testimony of plaintiff, of her employer, and of the other tenant that the floor was slippery, or even more slippery than usual, does not establish the fact that the cleaning or waxing had been done improperly. Those statements are merely subjective conclusions which do not per se indicate defendant's negligence. There is no showing of any foreign substance on the floor, or of any skid marks, or lumps of wax, or particularly shiny areas from which circumstances it might have been inferred that an excessive or improper application of wax had been made by the janitor. Nor does the evidence indicate that wax or other material had been used in the daily cleaning water, nor that the polishing machine had been operated excessively. Furthermore, the tenant's statement that he occasionally saw the janitor pour something in the water certainly does not establish that this procedure was followed the night before plaintiff's fall, or that the material added would improperly affect the condition of the floor. In fact, this evidence is of negligible persuasive value.

Emphasis and reliance is put by plaintiff on the inference of negligence from the superintendent's admission that the 6th floor janitor was not a good one, and from defendant's failure to call him to testify. The fact that the janitor may not have been a good one would not establish or even imply that he was negligent in the care and maintenance of the corridors as charged herein. Moreover, inasmuch as this is not a case within the res ipsa loquitur rule, and the burden of proof rests upon plaintiff to establish her cause of action, rather than upon defendant to prove its freedom from negligence, no presumption of negligence can be created from defendant's failure to call the janitor to testify. Painter v. Keeshin Motor Express Co., 297 Ill. App. 557. Such a presumption can only be drawn where plaintiff has made a prima facie case, and the burden of going forward is thereupon shifted to defendant; it cannot be

used to relieve plaintiff from the obligation of proving her case or to establish the requisite proof of negligence. Beery v. Breed, 311 Ill. App. 469.

Furthermore, defendant submitted evidence that the wax used last time the corridors on the 6th floor were waxed was of a particularly high grade, and that the use of the polishing machine would not increase the slipperiness of the rubber tile floor.

It is the opinion of this court, therefore, that there is a conspicuous lack of evidence of the positive negligent act or omission required to impose liability under the rule enunciated in the aforementioned Mack case. The facts presented herein distinguish the case from the authorities relied upon by plaintiff wherein liability was predicated upon evidence of negligence, either direct or circumstantial, rather than upon mere testimony of slipperiness.

In Minters v. Mid City Management Corp., 331 Ill. App. 64, the plaintiff slipped in a hallway that was being mopped, there was slime on the floor like soapsuds, and the plaintiff's dress was wet and dirty in the place where she fell, thereby indicating that the floor had not been properly mopped and dried.

In Denny v. Goldblatt, 298 Ill. App. 325, defendant had allowed a foreign substance (vomit) to remain on the floor of its revolving doorway for an unreasonable length of time or improperly swept it from the floor.

In Ryan v. Harry's New York Cabaret, 293 Ill. App. 534, plaintiff slipped on a foreign substance--powder--which had been allowed to remain on the floor. In Frazier v. Mace Ryer Co., 114 S.W. (2d) 150 (Mo. 1938), plaintiff slipped on a lump of wax on the floor, and the court in predicated liability on the ground that the floor was not uniform as to its surfaces inasmuch as there was a lump of wax at the place where plaintiff fell, specifically stated that mere waxing would not constitute the basis for liability.

In Henderson v. Progressive Optical System, 57 Cal App.

(2d) 180, 134 P. (2d) 807, there was evidence of a long skid mark and a lump of wax on the sole of one of plaintiff's shoes, from which the court concluded that "at the place where Mrs. Henderson slipped there must have been a surplus or excessive deposit of wax placed on the floor." In O'Conner v. J. C. Penny Co., 211 Minn. 602, 2 N.W. (2d) 419, the court rejected the contention that evidence of slipperiness in itself was sufficient to establish negligence, and imposed liability on the ground that defendant had not complied with the manufacturer's instructions for the use of the cleaning substance, and that the substance, if properly applied, would give the floor a gritty rather than slippery feeling, as submitted in the evidence.

From the foregoing analysis and review of authorities, it is apparent that inasmuch as the evidence presented heretofore, viewed most favorably for plaintiff, does not establish that defendant was negligent in the care and maintenance of the corridors on the 6th floor of the Smith Building where plaintiff fell, no liability can be imposed on the defendant. Therefore, the judgment for defendant notwithstanding the verdict, entered by the Circuit Court should ~~be~~ properly be affirmed.

JUDGMENT AFFIRMED

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
February Term, A.D. 1948

ABSTRACT

| | | |
|----------------------|---|------------------------------|
| MINA K. BISHOP, |) | |
| Plaintiff-Appellant, |) | Appeal from |
| vs |) | Circuit Court of |
| LEONARD CUSHING, |) | LaSalle County |
| Defendant-Appellee. |) | Hon. Louis A. Cearing, Judge |

~~334 I.A. 263~~

334 I.A. 263

Bristow, J.

Mina K. Bishop, present appellant, brought suit for divorce in the Circuit Court of Klamath County, Oregon on June 22, 1937 against Leonard Cushing, appellee. Summons was issued therein, but it was returned "not found." Service was then had by publication. Leonard Cushing, who had been a resident of LaSalle County, Illinois since January of that year, received no notice of the publication and did not appear in the cause either personally or by counsel.

In August, 1937, the defendant was defaulted, and a decree for divorce was entered. The custody of six minor children was awarded plaintiff, and it was further ordered that the appellee pay fifty dollars per month for the support and maintenance of the children.

In May 1947, appellant filed in the Circuit Court of LaSalle County a petition to show cause why he should not be held in contempt of court for failure to pay the amount accrued under the divorce decree entered in Oregon, which was in the sum of \$5,050.00. Appellee in his answer to the petition stated that he had never been a resident of Oregon since the commencement of the divorce proceeding; that he was never served with personal process; and

he did not appear either in person or by attorney. A hearing was had on the petition and answer. It appeared that the facts indicated hereinbefore were undisputed, and the lower court dismissed the petition for want of equity. This appeal questions the court's wisdom in so doing.

The law seems to be well settled in this state that a divorce decree, insofar as it pertains to a dissolution of the marriage, is an action in rem; but when it deals with the question of support allowances, it is an action in personam, and a judgment in personam is a nullity and is unenforceable when it is based upon constructive service. Penoyer v. Neff, 25 U. S. 714; 24 L. ed. 565; Cloyd v. Trotter, 118 Ill. 391, 394, 395; Proctor v. Proctor, 215 Ill. 275, 277; Griffin v. Cook County, 369 Ill. 380, 387, 388, 389; Bank of Edwardsville v. Raffaele, 381 Ill. 486, 488.

In the case of Proctor v. Proctor, supra, the defendant resided in Ohio and no personal service was had on him in the divorce proceeding which was commenced in Cook County. The defendant therein was defaulted; the marriage relation dissolved; and the defendant was ordered to pay alimony, solicitor fees, and to convey to the plaintiff a third interest in some real estate which he owned that was situated in the State of Ohio. The defendant sued out a writ of error to the Supreme Court in which decision the Court said: "That the court had no such jurisdiction of the person of plaintiff in error as authorized a money decree or decree in personam seems to be settled by the case of Cloyd v. Trotter, 118 Ill. 391. * * Insofar as the proceeding at bar related to the marital relation and its dissolution the proceeding is regarded as one in rem and the court was warranted in entering its decree dissolving the same. But the court could go no farther. It could not enter any binding decree in personam against plaintiff in error. * * So much of the decree as sought to vest in defendant in error an interest in real estate in Ohio was extraterritorial and beyond the jurisdiction of the court. That part of the decree was purely a proceeding in rem. and the res having its situs in another state, must

be controlled by the laws of the state of its situs. * * In decreeing alimony, solicitor's fees and an interest in the land in Ohio, the court was in error, and in those respects the decree is reversed."

In the case of Bank of Elwarisville v. Raffella, supra, the court said: "There is no doubt that where a defendant is a non-resident of the state, and the proceeding is in personam, publication will not give a court original jurisdiction over the person of the defendant, notwithstanding the non-resident may receive the notice, and a judgment in personam based upon constructive service is null and void."

Appellant in her brief has cited many cases which we are of the opinion have no application to the present situation. True it is that no one should be allowed to abandon his children and escape the responsibility of making provision for them. But that affords no legal justification for the enforcement of a decree that our courts have held to be a nullity.

The decree of the Circuit Court of LaSalle County should therefore be affirmed.

DECREE AFFIRMED.

Gen. No. 10226

Agenda No. 5

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, A. D. 1948

334 I.A. 263²⁻

THEODORE TRECKER,
APPELLANT

VS

CATHERINE TRECKER,
EXECUTOR OF THE ESTATE
OF WILLIAM C. TRECKER,
DECEASED
APPELLEE

APPEAL FROM THE
CIRCUIT COURT OF
LIVINGSTON COUNTY

Dove, J.

On December 6, 1915 a written partnership agreement was entered into between Conrad Trecker, Theodore Trecker, Wm. C. Trecker and M. H. Phillips for the purpose of carrying on a hardware and implement business in Odell, Illinois under the firm name of Trecker and Phillips. Conrad Trecker was the father of Theodore and William Trecker and the father-in-law of M. H. Phillips. The agreement provided for the conduct of the business for one year and if satisfactory the business would be thereafter continued. Without any new agreement being made the business was carried on for a number of years. Ultimately Conrad Trecker and M. H. Phillips dropped out of

the firm and the partnership consisting of Theodore Trecker and William C. Trecker continued under the same name. In January 1927 the merchandise, binder parts, tractors and fixtures belonging to the then partners, Theodore and Wm. C. Trecker, were sold to Wm. C. Trecker and the tin shop and plumbing business were taken over by a Mr. Kelso. For many years thereafter the business which had been conducted by Trecker and Phillips was conducted by Wm. C. Trecker as his individual business.

In March 1931 Conrad Trecker died testate. His two sons, Theodore and Wm. C. Trecker were named the executors and trustees under his Will and they qualified and served.

During the existence of the partnership between Theodore and Wm. C. Trecker, Conrad Trecker signed certain notes as surety for the firm of Trecker and Phillips and these notes aggregating \$7050.00 were filed and allowed as claims against his estate. To indemnify Conrad Trecker for his liability upon these notes the partnership, consisting of William C. Trecker and Theodore Trecker, had delivered to Conrad Trecker certain securities belonging to the partnership which were inventoried and collected by the executors as part of the assets of the Conrad Trecker estate. On February 18, 1941 the executors filed their final report in the Conrad Trecker estate showing receipts aggregating \$19,211.59 and disbursements and unpaid claims amounting to \$25,325.17, leaving a deficit of \$6113.58 and praying the Probate Court to issue an order to the circuit court showing the amount of said deficit to the end that the claims and costs of administration in the probate court be

paid and the estate closed.

There was then pending in the circuit court of Livingston County the case of Trecker v. Carlin, a proceeding to carry out the trust created under the provisions of the Will of Conrad Trecker. The final report of the executors was approved in the probate court on May 28, 1941 and on that day the judge thereof issued the requested certificate directed to the judge of the circuit court advising him of the approval of the final report of the executors, the deficiency of \$6113.58 and stating that this amount is necessary to be received through the trusteeship in order to pay the claims and costs of administration in the probate court. On June 3, 1941 the trustees filed in the circuit court in the trust proceeding their motion submitting said certificate to the circuit court and praying for an order authorizing them to pay said deficit out of trust funds.

William C. Trecker died on June 2, 1942 and on July 14, 1942, Theodore Trecker filed in the circuit court, as surviving trustee, his final report showing receipts aggregating \$46,300.30 and expenditures amounting to \$7955.54. Among the items of expense is \$6113.58 which the report shows was paid in to the county court "under order of court." This report was set for hearing for August 11, 1942 and notice was duly given to all parties interested, including Catherine Trecker, executrix of the Estate of William C. Trecker. On August 11, 1942 a hearing was had and an order entered finding, among other things, that the partnership of Trecker and Phillips consisted of Theodore Trecker and William C. Trecker, that Theodore Trecker and the Estate of William C. Trecker, deceased, are each liable for

and should pay one half of the indebtedness of Trecker and Phillips to the Estate of Conrad Trecker and that each of their shares should be charged with \$1849.16 being one-half of said indebtedness. The order fixed the fees to be allowed the trustees and ordered \$700.00 paid to Theodore Trecker and Catherine Trecker, as Executrix of the deceased trustee, William C. Trecker. In accordance with the order of August 11, 1942, the surviving trustee made distribution and an order duly approving the same was entered on August 25, 1942 and the trust was terminated as to all beneficiaries except Mary Edmonds, the trustee being directed to ^{retain} ~~xxxix~~ in trust the sum of \$3486.68 in accordance with the provisions of the Will of Conrad Trecker, deceased. Accompanying this order are the receipts of the various beneficiaries including Catherine Trecker, Executrix of the Estate of William C. Trecker and this receipt recites the payment of \$1849.17, being one-half of the indebtedness of Trecker and Phillips to the Estate of Conrad Trecker.

On March 19, 1943 Theodore Trecker filed his claim against the Estate of William C. Trecker, deceased, for \$1786.48. This claim states that it is for the "amount due, Theodore Trecker as sole surviving partner, from William C. Trecker in settlement of the partnership of Trecker and Phillips, either as contribution or otherwise." The bill of particulars submitted by claimant contained an itemized account of claimant with the firm of Trecker and Phillips. It contained debit items from November 1, 1923 to September 1, 1942 aggregating \$41,485.87 and credit items from November 1, 1923 to October 21, 1941, aggregating \$46,855.98. According to this account there was therefore due claimant from the firm of Trecker and Phillips \$5370.11. The bill of particulars also contained an

itemized account of William C. Trecker with the firm of Trecker and Phillips and this account contained debit items from November 1, 1923 to June 2, 1928 aggregating \$34,946.62 and credit items from November 1, 1923 to June 2, 1926, aggregating \$36,743.76. According to this account there was therefore on June 2, 1926 due William C. Trecker from the firm of Trecker and Phillips the difference between these amounts being the sum of \$1797.14.

The firm of Trecker and Phillips being indebted to claimant in the sum of \$5360.11 and being likewise indebted to William C. Trecker, deceased, in the sum of \$1797.14, it is the contention of claimant that the Estate of his deceased partner is indebted to him for one-half of the sum remaining after deducting \$1797.14 from \$5370.11 and it was for this amount \$1786.48 that he filed his claim. Upon a hearing in the probate court the claim was disallowed. Upon appeal to the circuit court a like order was entered and this appeal is prosecuted by the claimant.

Counsel for appellant contend that there was an express agreement between appellant and his brother, William C. Trecker to the effect that the partnership should not be terminated until the closing of the estate of their father, Conrad Trecker and the settlement of certain of the trusts created by his Will. His counsel state that in seeking to prove this claim they are handicapped by the fact that claimant is incompetent to testify to matters occurring prior to the death of William C. Trecker and they argue that even though the evidence does not prove any such express agreement the evidence is sufficient to warrant the court in concluding that the firm of Trecker and

Phillips was not terminated in 1927, as contended by appellee.

Counsel for appellee insist that the evidence discloses that William C. Trecker bought the merchandise and fixtures of the firm of Trecker and Phillips in January 1927 and at that time the partnership ceased to do business and was dissolved and William C. Trecker from that date conducted the business as his own individual enterprise, that an accounting of partnership affairs begins to run upon the dissolution of the partnership and that the five year statute of limitations began to run in January 1927 and therefore this claim became barred in January 1932.

There is no evidence in this record to support appellant's contention that the partnership of Theodore and William C. Trecker should not be terminated until the estate of their father should be closed or the trust created by his will terminated. The undisputed evidence is that William C. Trecker bought the merchandise and fixtures on January 24, 1927. Thereafter he conducted the business. In their statement of the case counsel for appellant say: " On January 24, 1927 the merchandise and fixtures (of the partnership) were sold to William C. Trecker, and other assets were sold to others."

It is true that after this date appellant took over the firm books and that he made all the entries therein, but no entries were made upon the account of William C. Trecker in the books after June 2, 1928. Appellant never rendered his former partner any statement of account. The father, Conrad Trecker, died in March 1931. William C. Trecker died on June 6,

1942 and on March 11, 1943 the instant claim was filed. This was sixteen years after the merchandise and fixtures, the property of the partnership had been disposed of and the partnership dissolved. Under the Will of Conrad Trecker any indebtedness of any of his children should be charged against the share of said child in his estate. There is nothing in any of the files in connection with the settlement of the father's estate in the county court or the trust proceedings in the circuit court which tends to show that the partnership existing between the sons prior to January 24, 1927 should not be terminated until after the death of the father and until his estate was closed and the trusts he created terminated.

In addition to the documents in evidence heretofore referred to, appellant testified to the effect that he made the entries in the day book on January 27, 1927 charging to William C. Trecker the "merchandise in store, tool sheds and basement as inventoried to date, \$7956.54" and "fixtures, including two safes, shelving, show cases, tool racks, \$856.88" and also the entries on January 31, 1927 where another charge to William C. Trecker appears "tractor parts, mower and as per list inventoried, \$718.66".

Vera Allen testified that from October 1939 to June 6, 1942 she was employed by William C. Trecker as his bookkeeper, that about two months before William died he had Theodore bring the ledger and the day book over to William's office, that William examined them there and William told this witness that so far^{as} as he could see they were correct. This witness further testified that while employed by William, some checks came in the mail in 1941 made out to Trecker and Phillips and William

told her to take them to Theodore as he was taking care of Trecker and Phillips and that he and Theodore would finally close up Trecker and Phillips when they got around to it after the estate was closed.

Harry Fairchild testified that he was a nephew of Theodore and William Trecker and in 1940 or 1941 he inquired of William about the notes upon which Conrad Trecker was surety and which had been filed as claims against the Conrad Trecker estate and William told him that these notes belonged to Trecker and Phillips.

The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up of the business. (Thanos v. Thanos, 313 Ill. 499. Ill. Rev. St. 1947 Chap. 106½, sec. 29). An accounting by one partner against another is barred after the lapse of five years following the dissolution of the partnership. (Blake v. Sweeting, 121 Ill. 67; Simpson v. Shadwell, 264 Ill. App. 480; Horne v. Ingraham, 125 Ill. 198). The right to an account of his interest shall accrue to any partner as against the winding up partners at the date of dissolution in the absence of any agreement to the contrary. (Ill. Rev. Stat. 1947 Chap. 106½, Sec. 43). Under the evidence in this record and the law this claim is barred by the Statute of limitations and the judgment of the circuit court in so holding is affirmed.

Judgment affirmed.

Gen. No. 10229

Agenda No. 8

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, A. D. 1948

334 I.A. 264

CHas. F. PLAIN, Trustee
Plaintiff-Appellee
vs.
W. J. GOLDEN
Defendant-Appellant

APPEAL FROM THE
COUNTY COURT OF
KANE COUNTY

Dove, J.

of Kane County
Upon a trial in the County Court without a jury,
the plaintiff recovered a judgment against the defendant for
\$320.00 and the record is brought to this court for review
upon an appeal by the defendant.

The case originated before a Justice of the Peace.
Upon the hearing in the County Court the only evidence was
that of John G. Plain who testified that he had the management
of a certain building located at the corner of Water and Main
Street in the City of Aurora, the lower floor of which consists
of five or six business rooms and the upper rooms were used
for hotel purposes and known as the Riverside Hotel. Sometime
during the year 1943 Lillian Trent, who then rented and
operated the hotel portion of the premises under an oral agree-

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Journal of Management Education 30(6)

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Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

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sentences. "I don't know" is not an answer for a question.

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ment at a rental of \$50.00 per month, sold the furnishings of the hotel to defendant, W. J. Golden and Golden went into possession, with the consent of the plaintiff and paid a like sum of \$50.00 per month rent. During the latter part of 1945 or the early part of 1946, Mr. Plain testified that he advised the defendant that the office of the State Fire Marshall was insisting that he install fire escapes and that for the rent he, Golden, was paying, he, Plain, could not afford to spend the money required to equip the building with fire escapes unless Golden would pay part of the cost. Mr. Plain further testified that he then told Golden that he had received some figures from a contractor and that the iron part of the proposed fire escapes would cost \$375.00 or \$400.00 but beyond that he could not tell Golden just what the cost would be. Thereupon Mr. Golden inquired what part of the cost Plain expected him to pay and Mr. Plain said he would leave it up to Golden and Golden then suggested that "we split it", to which plaintiff replied: "All right, that is satisfactory." Golden then inquired whether he could pay in monthly ~~in~~ ~~statements~~ payments and Plain answered, "No, its going to take a little while to install. You have the money and I think when the work is completed, you should take care of the expense." Mr. Plain testified that Mr. Golden made no reply and that this was all of the conversation.

The evidence is further that in the early part of 1946 Plain expended between \$4000.00 and \$4500.00 in making repairs and installing the fire escapes and in February 1947 when Golden came to Plain's office to pay his rent, Plain testified that he told Golden that he had received the bill for the fire escapes and that half of it would be \$400.00

and then said: "let's call it four hundred even, and that's what you owe," and Golden said: "All right". At this time Golden paid his usual rent of \$50.00 for the month of March and Plain accepted it. The next month, April, 1947, Golden sent Plain a check for \$90.00 and a like amount in May which Plain accepted. As of July 1, 1947 Mr. Plain terminated Golden's tenancy and thereafter instituted this suit to recover \$320.00 the balance which Mr. Plain insists is due him from the defendant.

Counsel for appellant insist that the evidence does not show any promise on the part of the defendant to reimburse the plaintiff to the extent of one-half of the cost of installing the fire escapes but if the evidence does so show, ^{Counsel for} then, appellant insists that appellant is not liable because the evidence does not show that there was any consideration for said promise. In support of this contention the cases of Hennessey v. Hill, 52 Ill. 281; Wilson v. Keeler, 9 Ill. App. 347; Toffenetti v. Mellor, 238 Ill. App. 330, affirmed in 323 Ill. 143; Voorhees v. Reed, 17 Ill. App. 21 and South Park Commissioners v. Chicago City Ry. Co., 286 Ill. 504, are cited and relied upon.

Counsel for appellee argue that the landlord was under no obligation under the lease to appellant or under the law to install fire escapes and that appellee did so as a result of the promise of appellant to pay one-half of the cost thereof. Counsel insist that appellee could have permitted the Fire Marshall to close the upstairs of the building or that he could have terminated the tenancy with a thirty-day notice but ~~because~~ he relied upon appellant's promise to pay one-half the cost of installing the fire escapes and in con-

sideration thereof he made the installation and did not terminate the tenancy and thereby appellee received a substantial benefit.

Appellant, under the existing month to month agreement, was entitled to the use of the premises his lease called for until the lease was properly terminated. He was under no obligation to install fire escapes or pay any part of the cost of their installation. He was only obligated to pay his rent as long as he remained a tenant. Assuming then that the promise was made as appellee contends, appellant had nothing more thereafter than he had before, nor did appellee suffer any detriment by merely permitting appellant to peacefully occupy the premises for which privilege he was paying appellee the stipulated rent. The promise of appellant therefore was not binding or enforceable because there was no detriment to the promisee nor advantage to the promisor. (Toffenetti v. Mellor, 238 Ill. App. 330). One cannot enforce an agreement to pay for ^{something} which he is otherwise legally bound or forbidden to do. ~~(Hennessey v. Hill, 52 Ill. 291)~~

Under the authorities, the trial court erred in rendering judgment for appellee and that judgment must be reversed.

Judgment reversed.

44284

EVELYN STONE,

Appellee,

v.

O. E. VAN ALYEA,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

33-114-264

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer for possession of a residence building known as 1242 Astor Street, in the City of Chicago. Upon trial the court found that defendant was guilty of unlawfully withholding from plaintiff possession of the premises described in the complaint, and that the right of possession was in plaintiff. Judgment was entered accordingly. Defendant appeals.

Defendant was the sole witness, and the essential facts are uncontroverted.

On August 16, 1945 defendant executed a two-year lease for the premises in controversy "to be occupied solely as a private dwelling." The pertinent provision of the lease reads as follows: "Fifth. That lessee will not allow said premises to be used for any purpose that will increase the rate of insurance thereon, nor for any purpose other than that hereinbefore specified, nor to be occupied, in whole or in part, by any other person, and will not sublet the same, or any part thereof, nor assign this lease, without in each case the written consent of the party of the first part had * * *."

On June 10, 1947 defendant's wife and four children left for their summer home located at Oconomowoc Lake, Wisconsin, to spend the school summer vacation period. Shortly before the Van Alyeas went to their summer home, one Frieda Foltz, a real estate

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1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

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Abstract

THE UNIVERSITY OF CHICAGO

• 2012

2010 年 12 月 10 日

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1. 1000 2. 1000 3. 1000 4. 1000 5. 1000

1. *Chlorophyll a* and *Chlorophyll b* contents were determined by spectrophotometry using the method of Lichtenthaler and Whistler (1973).

Journal of Management Studies, 19(1), 67-80.

2000 400 200 0

1. 1997-1998 1997-1998

1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2762 2763 2764 2765 2766 2767 2768 2769 2770 2771 2772 2773 2774 2775 2776 2777 2778 2779 2780 2781 2782 2783 2784 2785 2786 2787 2788 2789 2790 2791 2792 2793 2794 2795 2796 2797 2798 2799 2800 2801 2802 2803 2804 2805 2806 2807 2808 2809 2810

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Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

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101 11th St. N. Minneapolis, Minn.

100 100000 1000000

REPORT OF THE COMMISSIONER

agent, asked defendant to sublease the premises to eight young men while defendant's family was absent from the city and until they returned at the close of the summer vacation about September 18, 1947. Defendant told Foltz that he would "do so if it could be arranged with the (plaintiff) landlady's signature." Plaintiff refused consent to subleasing the premises. According to defendant when he "told the representative of these boys that I would not be able to go through with the deal their disappointment was so great I told them to come anyway, because customarily I have a few guests over the summer." About June 15, eight men, whose ages ranged from twenty-seven to twenty-nine years, moved into the premises here involved. All of them were total strangers to defendant except two whose families defendant knew. Defendant furnished them keys and upon entering the premises they brought with them enough clothes for their daily needs. They ate their meals elsewhere and hired a maid to clean the premises.

On June 18, 1947 plaintiff served a written notice on defendant, stating that he had violated the fifth provision of the lease and that unless he cured the violation within ten days plaintiff would terminate the tenancy and institute proceedings to recover possession. This notice defendant ignored.

The only question presented is whether defendant violated the fifth provision of the lease, prohibiting the premises to be occupied in whole or in part by any other person without the lessor's consent.

Defendant maintains that the terms of the fifth provision of the lease should be liberally construed since forfeitures are not favored in law, citing Peacock v. Feltman, 243 Ill. App. 236, and the recent case of Piller v. Metro Premium Co., 332 Ill. App. 55. An examination of the facts of the cases last cited discloses that they are readily distinguishable from those in the present case and therefore not in point. In the Piller case it appears that

Jeanette Zussman, owner of the Interstate Popcorn Co., was the wife of Irving Zussman, president of Metro Premium Co., the lessee; that Irving Zussman had no financial interest in the Interstate company and was not a salaried employee thereof; that he received a five per cent markup on orders which Metro company took for popcorn supplied by Interstate; that Jeanette Zussman had never seen the premises leased by Metro company, and that Interstate company had no property or assets of any nature on the leased premises. There we held as a matter of law on the uncontroverted evidence that plaintiff did not prove that Interstate company occupied the premises or any part leased by Metro company from plaintiff.

In the Peacock case the premises were leased to be occupied for a shoe store and general merchandise purposes. Several years after the lease was executed a new corporation was formed which was controlled by the same individuals who continued to conduct the business as theretofore and the name of the new corporation was placed on the front of the store. For seventy-seven consecutive months after the alleged breach the lessor accepted monthly checks for rent with full knowledge of the breach and gave receipts to the new corporation by name. The court held that there was a waiver by plaintiff of a technical breach of the lease. It also appears that the lessees organized another corporation whose object was to sell shoes at retail and organized solely as a matter of bookkeeping accounting. The court said (at page 243) "that said premises shall not be occupied in whole or in part by another person" must be given a reasonable construction; that the latter corporation was a part of the lessee's business organization and that its so-called occupancy of the premises was therefore the occupancy of the shoe stores company, a mere system devised by it for purely cost accounting purposes.

The first of these is the fact that the company was not a
 wife of living woman, and that the company was not a
 that living woman had a living husband. The company was
 company and was not a living woman; the company was
 a live one and was not a living woman; the company was
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 for purely cost accounting purposes.

In the present case the terms of the fifth provision of the lease prohibiting occupancy in whole or in part of the premises by any other person are plain and certain. And there can be no doubt that the defendant understood them. The same rules are applicable to the construction of leases as are applicable to the construction of other contracts. (Wentworth Avenue Building Corporation v. Trough, 332 Ill. App. 635.) Where the wording of a restriction is plain, simple, complete and unambiguous the restriction neither requires nor permits construction. (51 C. J. S. (Landlord and Tenant) Sec. 33, p. 542.) Leases containing similar provisions were held valid in Hieger v. Bruce, 322 Ill. App. 689 and 320 East Fifty Seventh Street Corporation v. Peckham, 63 N. Y. S. (2) 357.)

In his brief defendant says that he invited the men to occupy the premises notwithstanding plaintiff's objection for the following reasons: that he did not want to come home nights to a dark house; that he did not want to leave his home unprotected while he was spending week-ends with his family; and that they were ex-servicemen. Whatever defendant's motives may have been the fact remains that while he was visiting his family on week-ends at Oconomowoc Lake his alleged guests had the run of the house and had actual physical occupation of it "in whole" and the rest of the time "in part." If, under defendant's theory, it is permissible to take in eight strangers with whom he had had no social relationship before, then it seems to us he could for the same reasons quarter any number upon the premises.

We think the provisions here involved in the fifth paragraph of the lease were clearly violated, and the judgment is therefore, for the reasons assigned, affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

44135

RICHARD L. SONNENSCHN,)

Appellee,)

v.)

FRANK X. GORMLEY, individually and as
Executor of the Last Will and Testament
of HELEN D. FARWELL, Deceased, and
ELIZABETH S. GORMLEY,)

Appellants.)

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

3341.A.265

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Richard L. Sonnenschein filed a complaint in the Circuit Court of Cook County against Frank X. Gormley, individually and as Executor of the Last Will and Testament of Helen D. Farwell, deceased, Elizabeth S. Gormley and Unknown Heirs of Helen D. Farwell, deceased. He attached copies of two wills executed by Helen D. Farwell, one dated August 6, 1945 as Exhibit A, and the other dated July 27, 1943 as Exhibit B. He asserts that under Exhibit B he is named as the sole legatee and executor, while under Exhibit A, Elizabeth S. Gormley is named as the sole legatee, with Frank X. Gormley named as executor. He charges that because of the improper restraint and undue influence of Elizabeth S. Gormley and the mental condition of the testator the original of Exhibit A is not the last will and testament of Helen D. Farwell, deceased, and prays that the "probate" of the original of Exhibit A be set aside and that it be declared to be "not the last will and testament" of Helen D. Farwell, deceased. Elizabeth S. Gormley filed a motion to dismiss the action "upon the ground that the court has not jurisdiction of the subject matter", plaintiff not being an interested person. The motion was supported by her affidavit purporting to show that on July 18, 1945 Helen D. Farwell caused the original of Exhibit B to be destroyed by tearing and burning. Attached to

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the affidavit was a copy of a letter from plaintiff to Helen D. Farwell dated July 17, 1945, with which he enclosed the original of Exhibit B.

Frank X. Gormley, individually and as executor, filed a similar motion (supported by an affidavit). On March 7, 1947 the court entered an order that the cause came on to be heard upon the motions of the defendants to dismiss the action "upon the ground that the court has not jurisdiction of the subject matter" because the plaintiff is not an interested person, which motions were supported by the affidavits of Elizabeth S. Gormley and Frank X. Gormley, and having examined the complaint, the motions and affidavits in support thereof (no affidavits being submitted by the plaintiff in opposition thereto), and having heard the arguments of counsel and being fully advised in the premises, ordered that "the motions of the defendants be and they are hereby sustained." The court then, on motion of plaintiff for leave to file an amended complaint, the defendants excepting and objecting thereto, further ordered that "leave be and it is hereby granted to said plaintiff to file an amended complaint herein within 10 days from the date hereof, defendants to reply to said amended complaint 10 days thereafter."

Defendants appeal from that part of the order granting leave to plaintiff to file an amended complaint within 10 days and ruling defendants to answer within 10 days thereafter, and ask that this court, by way of relief, vacate that portion of the order and dismiss the action of plaintiff upon the ground that the "Circuit Court had not jurisdiction of the subject matter of said suit because the plaintiff is not an interested person." Plaintiff filed notice of cross-appeal from that part of the order sustaining defendants' motions to dismiss the action and ask the vacation thereof. The motions were presented under Sec. 48, of the Civil Practice Act,

(Par. 172, Ch. 110, Ill. Rev. Stat. 1947) on the ground that the court did not have jurisdiction of the subject matter of the action. Under Sec. 90 of the Probate Act (Par. 242, Ch. 3, Ill. Rev. Stat. 1947) plaintiff, to contest a will, is required to be an "interested person". Defendants maintain that when the Circuit Court found that it had no jurisdiction because plaintiff was not an interested person, entered an order so finding and sustained their motions to dismiss, it could not proceed further and that the order granting leave to file an amended complaint should be treated as a nullity.

There was no final judgment, order or decree. The order sustained the motions to dismiss. The case remained before the court. The fact that the motions were presented under Sec. 48 of the Civil Practice Act rather than under Sec. 45, or some other section, is of no consequence. The Circuit Court has jurisdiction of the class of cases presented by the complaint. The Court has jurisdiction of the subject matter and has jurisdiction to determine whether plaintiff is an "interested person". Sec. 77 of the Civil Practice Act (Par. 201, Ch. 110, Ill. Rev. Stat. 1947) provides that appeals shall lie to the Appellate or Supreme Court in cases where any form of review may be allowed by law, to revise the final judgments, orders or decrees of courts whose judgments, orders and decrees are reviewable therein. The order appealed from is not a final order. The case is pending in the Circuit Court. Defendants recognize that the case is undisposed of in the Circuit Court, as in their notice of appeal they ask the dismissal of the action "on the ground that the Circuit Court had not jurisdiction of the subject matter" of the suit. As the order appealed from is not final, we do not have jurisdiction to consider the appeal. Therefore, the appeal is dismissed.

APPEAL DISMISSED.

LEWE, P.J. AND KILEY, J. CONCUR.

44164

MORRIS RESNICK and ROSE RESNICK,

Appellants,

v.

LUDWIK GOLIK, JOHN A. BIEDE, JOSEPH
WIECZOREK and PETER FLASZA,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

3311A 206

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In an amended complaint filed in the Circuit Court of Cook County by Morris Resnick and Rose Resnick against Ludwik Golik, Joseph Wieczorek, Peter Flasz and John A. Biede, plaintiffs claim damages of \$13,000 for breach of an agreement to sell real estate, certain personal property and the good will of a bowling business. Issue was joined. In a trial without a jury the court found that the defendants breached the contract; that the measure of damages was the difference between the contract price and the value of the subject matter thereof at the time of the breach; that the subject matter of the contract at the time of the breach was "worth at least the consideration to be paid by the defendants"; and that the plaintiffs suffered no damages. The court, therefore, found the issues for the defendants and against plaintiffs and entered judgment thereon, to reverse which plaintiffs prosecute this appeal.

The real estate, bowling alley and personal property were located at 7221 North Western Avenue, Chicago. By a contract dated August 29, 1944 plaintiffs agreed to convey the real estate to the defendants. Defendants were to take title subject to a balance of \$20,700 due on a first mortgage. They paid \$2,000 as earnest money, to be applied on the purchase when consummated. They were to pay an additional \$11,000 in cash and to give a note for \$2,000, payable to the bearer in monthly installments of \$125

a month, with interest at 4% per annum on that portion from time to time unpaid.

The evidence sustains the finding of the court that the defendants breached the contract. Where the vendee refuses to perform, the measure of damages is the difference between the price fixed in the contract and the market value at the time fixed on for the delivery of the deed. The evidence shows that after the breach plaintiffs listed the property with several brokers; that on October 12, 1945 a purchaser was secured who paid \$31,600; and that the plaintiffs paid a commission of \$1,580 to the broker. There was no evidence as to the value of the property at the time contemplated for the delivery of the deed. The fact that the property was sold for \$31,600 does not necessarily show the fair market value. There was evidence that on August 28, 1944 an appraiser valued the real estate at \$35,700. The burden was on plaintiffs to prove the market value at the time the deed was tendered and this plaintiffs failed to do.

Plaintiffs retained the \$2,000 deposit as earnest money. The contract states that the earnest money may, at the option of the vendor, be retained as liquidated damages. The judgment should be sustained for the further reason that the earnest money has been retained by the plaintiffs as liquidated damages.

The judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR.

44203

ANTHONY B. MAZURK,

Appellee,

v.

WILLIAM E. MURAWSKA,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

33111 266²

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover on an account stated of \$542. Defendant denied the indebtedness and alleged plaintiff was indebted to him. In an amended statement of claim plaintiff itemized money advanced, resulting in the alleged account stated on December 2, 1941. Defendant admitted owing plaintiff \$200 on January 3, 1939, but denied the alleged account stated and denied receiving the alleged itemized advances. He counter claimed for a balance due him under an agreement with plaintiff for real estate profits during the years 1939, 1940 and 1941 in the amount of \$1,300. Plaintiff joined issue on the counter claim and also set up the statute of limitations in bar. The court, without a jury, found against defendant and for plaintiff on the amended statement of claim and entered judgment for plaintiff in the amount of \$440 and costs. It found against the counter plaintiff and for counter defendant on the counter claim and entered judgment thereon accordingly. Murawska, defendant and counter plaintiff, has appealed from both judgments.

In 1939, 1940 and 1941, Mazurk was attorney for Dorothy L. Krueger. During that period she furnished cash to him for the purchase of real estate mortgages. Mazurk engaged Murawska in these transactions to make the purchases, generally through bank receivers. The ultimate result in each transaction was a substantial profit to Mazurk and Murawska who had agreed to divide the profits

equally. During 1937 and 1938 Mazurk had advanced small amounts of money, from one-half dollar to five dollars, to Murawska. The latter says that on January 3, 1939, he owed Mazurk \$200 and paid him that amount. Mazurk says that on that date he carried over a debt due him from Murawska for \$550 for these advances. He says that thereafter through 1939, 1940 and in 1941 he continued making advances, and acknowledged some payments by Murawska, until their culmination in the account stated in December 1941. Murawska denies receiving any money after January 3, 1939, except on occasions when they would have lunch together and Mazurk would give him for expenses, "a dollar or something like that, to go out and look at some property."

The issues on the amended statement of claim and the cross complaint arise out of the foregoing facts.

In corroboration of his oral testimony regarding the advancements, plaintiff introduced in evidence three small black leather bound diary note books for the years 1939, 1940 and 1941. These carried many marginal penciled figures purporting to be the running account between Mazurk and Murawska of the advancements. The first figure, "550" appears at January 3, 1939, and the last, in that book, "700" at November 4. The first notation in the second book is "701" at January 8, 1940 and the last "500" on September 17, 1940. The first notation of the third book is "502" at July 21, 1941 and the last "542" at December 2, 1941. The largest single debit entry is \$11.00. Several credits are recorded, one of \$1.00, one of \$3.00, one of \$3.50 and two of \$5.00, one on April 24, 1940 of \$133.00 and one September 17, of \$100.00.

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Plaintiff admitted the real estate transactions with Murawska. He said he withheld from the latter's share of the profits only one credit, of \$133.00, to be applied on the debt; that on other transactions he credited whatever Murawska gave back and that he did not deduct whatever was owed him because Murawska needed it for living expenses; that he kept no book record of these real estate transactions which were always in cash with no receipts; and that, although he always carried a fountain pen, the record of the advances was made in pencil.

Witness Ryder testified in behalf of plaintiff that he frequently lunched with Mazurk and Murawska and that on several occasions Murawska would ask Mazurk for two or three dollars; that Mazurk would advance it and then enter it in a book like those in evidence; that he never heard them discuss any indebtedness due Mazurk from Murawska, except after this suit began when Murawska told him that he owed Mazurk "a couple of dollars". At the time of the trial this witness had been in Mazurk's office for a year and a half.

Defendant denied the account stated, that he ever saw the books before the trial, and that he acknowledged to Ryder that he owed Mazurk "a couple of dollars." He said he made no demand upon Mazurk for the balance due him for his share of the real estate profits because he did not know there was a balance due him until 1942 when he went to work for Miss Krueger. He denied paying Mazurk \$133.00 or \$100.00 in 1940. He persisted in his position that Mazurk loaned him no money after January 3, 1939. He testified to the real estate transactions and to the settlements of the profits, wherein he said Mazurk paid him less than his due.

At the conclusion of the evidence the trial court said that the statute of limitations had run against most of the items upon which Murawska based his counterclaim. It is likely that this

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view of the trial court is reflected in the finding and judgment on the counter claim. Plaintiff and defendant each held and owned the claims, subject of the amended statement of claim and counter claim respectively, when the statute of limitations had run against items in the counter claim. The barred items would, therefore, in this action be exempt from the statute of limitations. Ill. Rev. Stats., Chap. 83, Sec. 18; Steere v. Brownell, 124 Ill. 27; Brown v. Miller, 38 Ill. App. 262; Merrill v. Merrill, 215 Ill. App. 602. The trial court was in error on this point. If Murawska proved that there was a balance due him from the real estate deals in excess of the debt proved by plaintiff, a judgment for that excess in his favor would be proper. Steere v. Brownell.

The record does not show a strong case in behalf of plaintiff. There are circumstances unfavorable to him, such as the unbusinesslike pencilled running account of the advances, and the failure of Mazurk to reduce the account when settling with Murawska in the real estate transactions. There are, likewise, circumstances unfavorable to Murawska. His testimony of the payment of his indebtedness January 3, 1939, is very indefinite. His characterization of the advances is ambiguous. In one place he testified the advances were "loans for expenses" and in another that they were "expenses." His testimony of the alleged amounts due him is not definite.

Mazurk argues here in effect that the court's decision on the counter claim was principally a determination of fact and that the legal question of the statute of limitations was incidental. He says we should not disturb either judgment since neither is against the manifest weight of the evidence. The record does not show that the trial court passed upon the factual issues raised by

the counter claim. It is true that all the evidence counter plaintiff offered was received. We think, nevertheless, that the inference can be fairly drawn from the record, that the trial court decided against counter plaintiff on the legal question presented under the defense of statute of limitations. If the inference is correct, then we cannot say that the trial court would have decided against counter plaintiff on the factual issues. It might or might not have. We think justice requires certainty that those issues are determined at a trial.

Were the trial court to find that there was due Murawska from Mazurk on the counter claim more than \$440.00, having previously found for Mazurk on his claim, no judgment would be entered for Mazurk and a judgment for the excess would be entered in favor of Murawska. We cannot consistently, therefore, affirm the judgment for plaintiff on the amended statement of claim, while reversing the judgment on the counter claim. Both judgments are, therefore, reversed and the cause is remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED.

LEWE, P.J. AND BURKE, J. CONCUR.

44219

MARCEL A. ACKERMANN,

Appellee,

v.

JOSEPHINE C. ACKERMANN,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

33-1A.267

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a divorce action on the ground of cruelty, brought by a husband, and a cross action by his wife for separate maintenance. The chancellor granted the divorce and dismissed the counter claim for want of equity. Defendant and cross plaintiff, hereinafter called defendant, has appealed.

The parties were married January 28, 1937. No children were born of the marriage. The parties lived in Chicago until plaintiff entered the military service and was assigned in 1943 to Camp Lee near Petersburg, Virginia. Defendant resided in Petersburg during this period.

The acts of cruelty upon which plaintiff's action is based are alleged to have occurred on July 22 and September 1, 1945 in Petersburg. Plaintiff testified that on the first mentioned date defendant struck him a "medium blow" in the face which caused a swelling, but which he thought "nothing much" of at the time. He testified that on the second date while he was seated in their Petersburg home defendant struck him on the head with an onyx ash tray, knocking him to the floor and that she then struck him again "12 to 15" times while he was down. As a result of these blows on the head, nineteen stitches were required to close the wound and plaintiff was taken to Camp where he was confined for three weeks in the hospital.

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10. The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the City of New York, for the year 1911:

1. The first step is to identify the problem. In this case, the problem is that the company is not making enough profit. The reasons for this could be many things, such as high costs, low sales, or poor management.

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Sergeant Rogers, a friend of plaintiff's at Camp Lee, corroborated plaintiff's testimony. He said he saw the swelling after the July 22nd incident, and that he took plaintiff to the doctor and to Camp after the assault of September 1st. His testimony with reference to a conversation July 23rd with plaintiff, concerning the cause of the swelling should not have been admitted. Ryan v. Ryan, 321 Ill. App. 467.

Defendant denied striking plaintiff on July 22, 1945 and said the September assault was made in self-defense when plaintiff choked her during an argument over her refusal to give him a divorce. It is admitted that there were violent arguments between them and that the question of a divorce was involved. Plaintiff denied choking his wife.

Defendant contends that there was no proof of extreme and repeated cruelty because, as to the July incident, the plaintiff said he "thought nothing much of it at that time; that the December date was the decisive factor." She also relies upon plaintiff's admission of the argument over the divorce on September 1. She says that it appears from the evidence that the assault was deliberately induced to provide plaintiff grounds for a divorce action. Finally she contends that even if both assaults are admitted, there was no evidence to warrant a decree for plaintiff.

Factual issues were raised as to whether defendant struck plaintiff July 22nd and why she hit him with the ash tray September 1st. The chancellor heard the three witnesses. Presumably he believed plaintiff's and did not believe defendant's version. We cannot say that he should not have done so.

A legal question presented is whether, admitting the July incident as true, it and the September assault were sufficient grounds upon which to base a decree for divorce for extreme and

repeated cruelty. It is our view that defendant's estimate in July of the blow then struck is not important in view of the assault in September. We need not decide whether the several blows on September 1 were sufficient, aside from the July incident, to support a decree for extreme and repeated cruelty. We are of the opinion that the chancellor correctly decided the question of law in the affirmative. We see no need of considering the other points raised. The decree is affirmed.

DECREE AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

44234

JOSEPHINE FRANKS GLASER,

Plaintiff - Appellant and
Cross - Appellee,

v.

CHICAGO TITLE & TRUST COMPANY,

Defendant - Appellee,

and

MOSES LEVITAN, DOROTHY L. RUBEL and
WILLIAM L. SHAWN, Trustees under the
Last Will and Testament of JACK MORRIS
FRANKS, Deceased,

Defendants - Appellees and
Cross - Appellees,

and

NORVIN H. FRANKS, HANNAH SIMON and
SALLY FRANKS HIRSCH,

Defendants - Appellees and
Cross - Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

334 L.H. 267²
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MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a proceeding for an accounting. It was brought by the trustees under the will of Jack Franks, deceased, hereinafter called Petitioners, against the trustees under the will of his father Jacob Franks who died in 1928. In determining the issues, raised upon the petition and answers, the chancellor construed two agreements under which the income was distributed differently from the method provided in the will of Jacob Franks. The account of the respondent trustees, called Trustees herein, was approved. The construction of the agreements was adverse to Josephine Glaser, plaintiff, and the Norvin Franks, Hannah Simon and Sally Hirsch, referred to herein as Three Annuitants. The Trustees were ordered to distribute the income accordingly. Plaintiff has appealed and the Three Annuitants have cross appealed.

Jacob Franks died in 1928. He left a will bequeathing annuities of \$1,000 each to 13 nieces and nephews from the income of a trust, hereinafter referred to as the Trust, containing his residuary estate. The balance of the net income from the Trust was given to plaintiff, his daughter, and Jack Franks, his son, in equal shares. Upon the death of each leaving issue, one-half of the remainder, after setting aside sufficient to produce the income for the annuities, was to go to that issue. No provision was made for the event of the death of the testator's children without issue.

The corpus of the Trust diminished after the death of Jacob Franks to a point where the income was insufficient to provide for the annuity payments. This precluded plaintiff and Jack Franks from sharing in the income. An agreement was made June 21, 1938 between the annuitants, plaintiff and Jack Franks and the Trustees. It provides \$250 for each annuitant in full payment under the terms of the Trust to and including December 31, 1938; that the net income for the ensuing five years, plus that on hand as of December 31, 1938, be divided from "time to time" into two equal parts; and that one part shall be distributed to plaintiff and Jack Franks, designated Residuary Beneficiaries, from "time to time in the proportions to which they would become entitled to distribution as to all sums payable to them under the terms of the will." It then provides for equal payments for annuitants out of the other half, not to exceed \$1,000 for each. The excess to be added to the part distributable to the Residuary Beneficiaries. The parties were to be restored to their rights under the will at the end of the five year period.

Jack Franks died testate without issue July 11, 1938, before the agreement became effective. His property was left to

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the Petitioners as trustees. None of the beneficiaries is in the Franks' family. No part of the income from the Trust was paid to the Estate of Jack Franks. After the latter's death plaintiff on December 15, 1938 sued for a construction of her father's will as to the effect of the death of Jack Franks without issue. Petitioners answered the complaint contending for a construction of the will under which the Estate of Jack Franks would receive one-half of the income and one-half of the corpus of the Trust. The trustees asked for directions as to the correct construction.

During the pendency of the will construction suit the agreement of March 5, 1943 was made between plaintiff, the annuitants and the trustees. It provided for the disposition of the income from the Trust for the period beginning January 1, 1944 to December 31, 1948. By its terms plaintiff was to have one-fifth of the income; three-fifths was to be divided among the annuitants, not to exceed \$1,000 each in any one calendar year; one-half of the excess, if any, of the three-fifths remaining after payments to annuitants was to go to plaintiff; and "All other net income" was to be retained by the trustees until final disposition of the plaintiff's suit to construe the will.

The chancellor construed the will against the contention of Petitioners and in favor of plaintiff. He entered a decree June 28, 1945, giving her all the income of the Trust, subject to the annuity payments, and decided that the corpus of the Trust should go to her children at her death. She had three minor children at the time of the trial. Petitioners appealed to the Supreme Court from that decree. The decree was affirmed as to the disposition of the corpus, but reversed as to the disposition of the income. Glaser v. Chicago Title & Trust Co., 393 Ill. 447.

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The Supreme Court held that since Jacob Franks made no provision for the disposition of Jack Frank's share of the income beyond the latter's life, it became intestate property and, subject to the contingency of Jack Franks leaving issue surviving, descended at the death of the testator to plaintiff and Jack Franks one-half each. Jack Franks, having died without issue, the Supreme Court decided that one-half of his share of the income was vested in plaintiff and the other half in the Estate of Jack Franks.

The trial court upon remandment ordered the Trustees to pay three-fourths of the net income of the Trust accruing after the death of Jack Franks, to plaintiff during her life, and one-fourth to the trustees under the will of Jack Franks. These payments to be subject to the payment of the annuities and to the agreements of June 21, 1938 and March 5, 1943. This decree was entered December 18, 1946.

The instant petition was filed January 15, 1947. It did not ask for a construction of the agreements, it asked for an accounting to the Estate of Jack Franks of payments made by the Trustees from the Trust. Plaintiff answered the petition contending for a construction of the agreements of 1938 and 1943 which would give her all of the net income after payments to the annuitants. The Three Annuitants answered contending for a construction of the 1938 agreement which would give annuitants under the Will of Jacob Franks that part of the income provided in that agreement for Jack Franks. The trustees answered pointing out the conflicting claims of petitioners and plaintiff, expressing doubt as to which claim was correct and asking protection of the court through construction of the agreements. Petitioners replied to the answers of the plaintiff and the Three Annuitants, claiming that their contentions were barred under the rule of res judicata.

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The chancellor ordered the trustees to pay one-fourth of the income, not payable to the annuitants under the 1938 agreement, to Petitioners and three-fourths to plaintiff. He ordered the trustees to pay one-tenth of the net income under the 1943 agreement to Petitioners and three-tenths to plaintiff. He found that the Three Annuitants had no right, title or interest in the disputed income under the 1938 agreement.

Petitioners argue that both plaintiff and the Three Annuitants could have placed in issue, in the will case, construction of the agreements and, not having done so, they are now precluded from doing so. It was stipulated that plaintiff's counsel offered the agreements in evidence in the will construction trial and that they were received in evidence "without condition or qualification." The agreements were not in issue in that case. They had no bearing on the construction of the will. The Supreme Court made no reference to them in its opinion. This would indicate that they were not necessarily involved in the case. It is not enough under the rule of res judicata that both proceedings refer to the same subject matter. There must be identity of cause of action. 30 Am. Jur. 916. Assuming, but not deciding, that there is identity of parties and cause of action, we do not see how the questions raised here on the agreements could have been determined under the issues in the will construction case. It follows that there is no merit in this contention of petitioners. Boddiker v. McPartlin, 379 Ill. 567.

Petitioners say that the Three Annuitants have waived what claim, if any they had, in the second agreement. The provision relied on recites that " * * * the annuitants waive any and all accumulations of annuities which they claim accrued, or may accrue, under the terms of the Will prior to January 1, 1949." We think

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the language does not support the contention. The language of the waiver clearly referred to accumulations of the part of the annuities reserved to the Annuitants in the agreement.

The preamble of the 1938 agreement recites the provision for the Residuary Beneficiaries from the net income of the Trust; the payment to the Annuitants of \$100 each in 1933 with no payment since; the expectation that there will be income for annuities in 1939; certain legal questions not pertinent here; and the desire of the parties to avoid court procedure in determination of the question. The agreement then recites the opinion of the Annuitants and Residuary Beneficiaries that strict enforcement of the terms of the "Trust Agreement" (sic) would work a hardship upon the Residuary Beneficiaries inconsistent with the true intent of the testator. According to their opinion they agreed to modify their rights under the Trust terms.

Each party before us makes a claim which presupposes the transactions in the agreements were gifts. We shall, therefore, accept the presupposition as true. Plaintiff claims the gift in the first agreement was to a class composed of Jack Franks and herself and that she is entitled to the full gift under her right of survivorship. Petitioners concede the gift was to a class, but dispute the composition of the class. They say the class was "Residuary Beneficiaries from time to time" and that the beneficiaries after the death of Jack Franks were plaintiff and petitioners. The Three Annuitants claim the gift was not to a class but to specific individuals, plaintiff and Jack Franks. They contend that, the latter having died, the gift intended for him reverted to the donors.

There is no merit to the claim of Petitioners. The agreement specifically names plaintiff and Jack Franks the Residuary Beneficiaries. The phrase "from time to time" used in the agreement in no wise modifies the designation. It refers to the division

and distribution of the income.

There is no express limitation of the gift in favor of the donors. So far as the terms of the gift were concerned the donation was absolute. Grossman v. Greenstein, 155 Atl. (Md.) 190. Jack Franks died before the proceeds of the gift became available, but the gift took effect when the agreement was executed. The transaction could not be a gift unless the rights were transferred at the time. Suchy v. Hajicek, 364 Ill. 503; Telford v. Patton, 144 Ill. 611. There was no reverter to the donors. This disposes of the claim of the Three Annuitants.

The cases cited by plaintiff in support of her claim involve testamentary gifts. No cases are cited to sustain the claim to a gift inter vivos to a class. The gifts here were inter vivos since the parties were living when the object of the gift, the right to share in the legacies of the annuitants, passed under the agreement. There is no express limitation of the gift to Jack Franks in favor of plaintiff. The gift was to each in the proportion to which each was entitled to distribution as to all sums payable under the terms of the will of Jacob Franks. Under the will each was entitled to one-half the income after payment of the annuities. This construction meets the purpose expressed in the agreement, to protect the Residuary Beneficiaries consistently with the intention of Jacob Franks.

The agreement of March 5, 1943 recites the making of the earlier agreement to terminate December 31, 1943; the desire of the parties to make another agreement disposing of the income for the succeeding five years; and the filing of counter claims in the will case by the Trustees expressing doubt as to the rightful distribution of the income paid to Jack Franks before his death. Its further provisions are recited hereinabove. The pertinent

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provision is that by which "all other net" is retained by the Trustees until a final decree, in the will case, determining who is entitled to the income from the Trust which would otherwise be payable to Jack Franks, if living. The Three Annuitants make no claim with respect to this agreement.

It will be noted that, though made after the death of Jack Franks and making reference to his death without issue, the agreement does not make the gift to plaintiff alone. Petitioners say that the net income retained was to await distribution under the formula established by the Supreme Court in the will case. Plaintiff argues that the retention was "out of caution" on the part of the Trustees to avoid liability. There was a possibility, she says, that the contention of Petitioners in the will case would be sustained and the income from the Trust increase to an amount exceeding the full income due the annuitants. Accordingly, she argues, the Trustees, especially the Company, would be in the position of contracting to dispose of an interest which they did not entirely control. We see no merit in this.

The 1943 agreement does not express a purpose. There is nothing said about protecting plaintiff, the Residuary Beneficiary. Clearly, the reason implied for the agreement, is the doubt in the minds of the Trustees, as expressed in quotations from their counter claim in the will construction suit, as to who was entitled to the income, payable to Jack Franks during his life. We think the fair inference from the language of the instrument is that the part retained was to be distributed by the Trustees, according to the manner the Supreme Court resolved the doubt of the Trustees. The Supreme Court having decided how that income should be distributed, resolved the doubt. The decree providing for distribution under the Trust, "subject to" the agreements does not militate against

this conclusion. The annuitants were entitled to more under the will than under the agreements. The court properly qualified the distribution,

Petitioners ask that we affirm the decretal order.

For the reasons given the order is affirmed.

DECRETAL ORDER AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

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APPELLATE COURT

FOURTH DISTRICT

February Term, A. D. 1948

Term No. 48 F 8

Agenda No. 5

ELSIE McGOOKEY,

Plaintiff-Appellant,

vs.

CARRIE L. WINTER, Executrix,

Appellee.

Appeal from the
Circuit Court of
Richland County.

3341A307

CULBERTSON, P. J.

This appeal arises from an action in ejectment and for an accounting of rents and profits from the occupancy of a dwelling house in the City of Olney, Illinois, filed by ELSIE McGOOKEY, Appellant (hereinafter called plaintiff), as against CARRIE L. WINTER, Executrix of the Estate of ELIZABETH YONAKA (hereinafter called defendant).

Plaintiff had filed a complaint in ejectment in 1943, in which it was alleged that by virtue of a certain deed from the deceased, Elizabeth Yonaka, plaintiff was entitled to the fee simple title to the premises involved. The executrix ^{had} ~~had~~ taken possession of the premises and continued in possession, collecting the rents from the property. In December of 1946 the Court entered judgment for plaintiff on the pleadings, finding that plaintiff was the owner of the fee simple title to the premises and entitled to immediate possession of the property and that the defendant wrongfully held possession of the premises and should deliver possession to plaintiff, and thereupon proceeded to order that the cause be continued for

further hearing on the question of the plaintiff's damages. In July of 1947, the hearing was held on the question of damages and the accounting of the rents collected by the defendant, before the Court without a jury. Thereupon, the attorney for the defendant Executrix filed a motion for an allowance of attorney fees to himself, as attorney for the Executrix, which recited that the only money the Executrix received was the money received as rents during the period of the litigation involved in this proceeding, and requested that the attorney be granted a reasonable attorney's fee, payable out of the rents collected from the property referred to in the order of the Court. Over the objection of the plaintiff, the Court heard evidence as to the value of the attorney fees in the ejectment case, and allowed a fee of \$200.00. The Court heard evidence on the question of the accounting, which indicated that the defendant Executrix had collected a total of \$1494.50. There was evidence that the defendant had appealed from a case previously brought in the Circuit Court against the heirs of Elizabeth Yonaka and defendant Executrix, involving the title to the property, preceding this action of ejectment. In that case the Executrix had expended \$54.70 for the filing fee in the Supreme Court on appeal, and had paid attorney fees of \$250.00. It is noted that as the result of the previous action, the plaintiff was victorious, but the action for possession was required to be filed separately (McGOOKEY vs. WINTER, 381 Ill. 516).

The present ejectment suit, as noted above, resulted in a judgment for possession as against the defendant Executrix. The Trial Court, after hearing the evidence, allowed as part of the costs in this case, \$304.70, which included \$250.00 for the attorney for the defendant Executrix for services to the defendant Executrix in the appeal of the former case. The Court also allowed defendant's attorney an additional fee of \$200.00, for

the unsuccessful defense of plaintiff's ejectment suit. The Court directed that the defendant deduct these amounts, totaling \$504.70, from the funds held in her hands resulting from the collection of rents from plaintiff's property. It is from such order of the Court below, directing defendant to deduct the said sum of \$504.70 from the rents collected, that plaintiff appeals in this proceeding.

As has been repeatedly noted in cases determined by the Supreme Court of this State, costs of litigation were not recoverable at Common Law and can only be recovered when specifically authorized by Statute (RITTER vs. RITTER, 381 Ill. 549; WINTERSTEEN vs. NATIONAL COOPERAGE CO., 361 Ill. 95). Costs of litigation may be recovered by the defendant only when plaintiff fails to recover judgment (1947 ILLINOIS REVISED STATUTES, Chapter 33, Section 8).

The Supreme Court of this State has expressly stated that attorney fees are never allowed to unsuccessful litigants and are not even allowed to successful parties in absence of a Statute or agreement authorizing the allowance, either in Courts of Law or Courts of Equity (RITTER vs. RITTER, supra). It is obvious, therefore, that the Court below erred in allowing the sum of \$504.70 involving the cost of taking the appeal in the previous case and of attorney fees in that case, and of the allowance of attorney fees in this proceeding.

The orders entered in the Probate Court authorizing the appointment of an attorney and allowing him fees cannot have the effect of charging property which is not an asset of the estate.

On appeal in this Court for the first time in this proceeding the defendant raised the issue that the only way in which the mesne profits could be recovered in an ejectment suit is by supplementary proceedings prescribed by the Act itself (NICHOLS vs. BRADLEY, 223 Ill. App. 377), and by reason of the

fact that plaintiff had simply prayed for damages in the amount of \$250.00, she could not recover more than such amount.

No objection was made in the Court below that plaintiff was not entitled to an accounting in the proceedings in the Court below. Evidence was introduced on the rental collection for the entire period involved in the accounting and no objection was made at any time that plaintiff was not entitled, under the pleadings, to recover the full amount. The findings indicated that the defendant had collected \$1494.50. The amount claimed in the complaint could have been amended at any time in the Trial Court if any objection had been raised in such Court. There was no lack of jurisdiction of the subject matter involved in this proceeding in the Court below and the parties have, therefore, waived any objections which might have been made to the nature of the proceeding, and by failing to object at any time in the Trial Court on the issue of the amount requested in the complaint, defendant has precluded herself from now raising such matter for the first time in this Court. The fact that the Court entered a formal order that the cause would be continued for further hearing on the question of plaintiff's damages and that such hearing was had seven months later, without objection to the procedure involved, constituted a waiver of any objections which might have been raised by defendant as to such matters.

The judgment of the Circuit Court of Richland County, entered herein, directing defendant to deduct from the amount found on the accounting to be due to plaintiff, the sum of \$504.70, is therefore reversed and this cause is remanded to such Circuit Court, with directions to amend such decree to eliminate all such items based on allowance of attorney fees, and costs and expenses, and filing fee, and printing costs in the Supreme Court, and to enter an order in such cause consistent with the Views expressed in this opinion.

Reversed and remanded,
with directions.

Justices Bardens and
Scheinman Concur
(Abstract)

43857

WILLOW DEAN RENSSELAER for the
use of MATTHEW JONES,
Appellant,
v.
MID-STATES INSURANCE COMPANY,
a corporation,
Appellee.

334 I.A. 389

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

301

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought garnishment proceedings against Mid-States Insurance Company. Trial by the court without a jury resulted in a judgment discharging the garnishee, from which plaintiff appeals.

There is substantially no dispute as to the essential facts. Plaintiff was injured as a result of a collision between two automobiles, one of which was owned by Matthew Jones. Default judgment was entered against him in the amount of \$3000. Execution issued, which was returned no part satisfied, and about three months thereafter garnishment proceedings were instituted against defendant, which answered "no funds." Upon contest of the answer, the following facts were adduced by the several witnesses who testified for the respective parties. One Walter C. Eden was an agent for the Mid-States Insurance Company with authority to write policies and issue binders on the company. In November 1944 he called Jones by telephone and stated that he wanted to sell him a public liability and property damage insurance policy. Jones and Eden did not know each other. As the result of the conversation Jones agreed to buy a policy from Eden, for which he was to pay \$10 on account of the premium of \$28. Shortly thereafter Eden mailed Jones an abstract of the public liability and property damage insurance policy with the Mid-States Insurance Company, whereupon Jones mailed him the \$10 down-pay-

Page 2

RECEIVED BY THE SECRETARY OF THE

DEPARTMENT OF JUSTICE

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WASHINGTON, D.C.

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TO THE ATTORNEY GENERAL

FROM THE DIRECTOR, FBI

SUBJECT: JAMES EARL RAY; AKA; I-100-441100

RE: BUREAU TELETYPE TO BUREAU, OCTOBER TWENTY, SIXTYTHREE.

FOR INFORMATION OF THE BUREAU, THE FOLLOWING IS A SUMMARY

OF THE MATTER:

ON OCTOBER TWENTY, SIXTYTHREE, THE FOLLOWING INFORMATION

WAS RECEIVED FROM THE NEW YORK OFFICE:

ON OCTOBER TWENTY, SIXTYTHREE, A TELEPHONE CALL WAS MADE

TO THE NEW YORK OFFICE FROM AN INDIVIDUAL WHO IDENTIFIED

HIMSELF AS "JAMES EARL RAY" AND STATED THAT HE WAS

INTERESTED IN OBTAINING A PASSPORT FOR TRAVEL TO EUROPE.

THE INDIVIDUAL STATED THAT HE HAD BEEN ADVISED BY A

PERSON WHO IDENTIFIED HIMSELF AS "JAMES EARL RAY" THAT

HE COULD OBTAIN A PASSPORT FOR TRAVEL TO EUROPE IF HE

COULD OBTAIN A LETTER FROM THE NEW YORK OFFICE.

THE INDIVIDUAL STATED THAT HE HAD BEEN ADVISED BY A

PERSON WHO IDENTIFIED HIMSELF AS "JAMES EARL RAY" THAT

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THE INDIVIDUAL STATED THAT HE HAD BEEN ADVISED BY A

PERSON WHO IDENTIFIED HIMSELF AS "JAMES EARL RAY" THAT

ment, as agreed. The balance of the premium, \$18, was paid by Jones' wife in Eden's office two days after the accident in which plaintiff was injured. Prior to this Jones had received bills from Eden for the balance of the premium. After Eden learned of the accident he gave Jones an automobile policy with the Virginia Surety Company, the premium for which was \$28, the amount Jones and his wife had previously paid to Eden, and which Eden had accepted.

Plaintiff's counsel argue that the abstract which Jones received looked like an ordinary insurance policy in that it had a designated number, gave the name of the insured, his address, his occupation, the policy period, designated the object insured, set forth a specific coverage and the premium to be paid, with a breakdown of the total premium, designating the amount for the property damage, the amount for the public liability and for the medical reimbursement feature, and that it differed from the ordinary insurance policy in that it did not have all the exclusion and inclusion clauses thereof. However, at the top of this document there appears the following phrase: "This is not a contract of insurance; it is an abstract of the written portion of the policy numbered below, as said policy stood at the date this abstract was prepared, and is furnished on the condition that it is an abstract only, conferring no rights on the holder and imposing no liability upon the company." Plaintiff's counsel argue that Jones was an illiterate man, and that this was the first public liability and property damage policy he had ever ordered, "so that when he received this abstract he had no way of knowing that it was not the full complete standard public liability and property damage insurance policy of the Mid-States Insurance Company." However, the law

is well settled that one who is unable to read must ascertain the meaning of a contract and cannot escape the effect of its limiting provisions by reason of his alleged illiteracy. The Supreme Court of Mississippi stated this proposition succinctly when it said, in Mixon v. Sovereign Camp, W.O.W., 155 Miss. 841, 125 So. 413, that "of course the suggestion of illiteracy cannot prevail, for the manifest reason that there cannot be two separate departments in the law of contracts, one for the educated and another for those who are not. Certainly the laws on insurance could never be administered on any such basis." And as stated in Spina v. Spina, 372 Ill. 50, "If defendant could not read the deed which he now assails a duty rested upon him to procure some reliable person to read and explain it to him." An insured is bound by the terms of a policy, whether illiterate or not, unless prevented from reading it (Maryland Casualty Co. v. Adams, 159 Miss. 88, 131 So. 544), and he is required to examine his policy and if it is not in accord with the agreement he must notify the company immediately (Pacific Mut. Life Ins. Co. v. Rosenthal, 122 N. J. Eq. 155, 192 Atl. 742). The facts disclose that Jones lived with his wife who was literate and who could have read the document to him. The experienced trial judge who heard the cause held from the evidence and exhibits adduced upon the hearing that there was no policy in effect upon which garnishment could be predicated, and the principal question presented is whether or not the document constituted a contract of insurance between Matthew Jones and the Mid-States Insurance Company. From an examination of it and the oral testimony adduced upon the hearing, we think the conversation between Jones and Eden merely established an agreement for a contract of insurance. The parties evidently did not intend to and did

not create any mutual obligations by that conversation. Certainly the Mid-States Insurance Company could not have brought suit against Jones for the collection of the premium. In other words, the situation merely involved the preliminaries to the making of a contract of insurance. Both parties contemplated that a policy would be issued at a future time. When the document was issued it stated in unmistakable terms that it was not a contract of insurance but merely an abstract of the written portion of the policy and that it was furnished on the condition "that it is an abstract only, conferring no rights on the holder and imposing no liability upon the company."

Upon oral argument plaintiff's counsel strongly urged that the conversation between Jones and Eden constituted an oral agreement of insurance, and numerous cases are cited holding that such contracts are valid in this state. As to this phase of the controversy, we think the evidence discloses that Jones' conversation with Eden amounted to nothing more than an agreement to furnish a policy of insurance in the future and did not constitute a present oral contract of insurance. Eden testified that he took an order for insurance for which Jones was to make a down payment upon receipt of the policy, and evidently the parties did not intend to and did not create any mutual obligations by that conversation. The ultimate question to be decided is whether the document constituted a chose in action in Mid-States Insurance Company, upon which garnishment proceedings could be predicated. Since it does not contain a promise of performance of any type by the insurance company or Jones, it is difficult to understand how it can be characterized as a chose in action.

On oral argument both parties characterized Eden as a

The first thing I noticed when I stepped out of the car was the cold. It was a sharp, biting cold that seemed to penetrate my coat. I shivered as I walked towards the entrance of the building. The air was thick with the scent of old wood and the faint, distant smell of coffee. I had heard that the office was old, but I didn't realize how old it would be. The walls were made of dark, polished wood, and the floors were covered in a thick, dark carpet. The lighting was dim, with only a few small lamps providing a warm glow. I felt a sense of unease as I walked through the corridors. The silence was oppressive, and the shadows seemed to be watching me. I had heard that the office was haunted, but I didn't believe it until now. The air was thick with a strange, almost electric energy. I felt a sense of being watched, as if there were invisible eyes everywhere. I tried to shake the feeling off, but it was too strong. I had to leave. I had to get out of there. I ran down the stairs, my heart pounding in my chest. I didn't look back. I didn't want to see what was waiting for me. I ran until I was out of sight. I didn't stop until I was home. I didn't sleep that night. I was too scared to. I was too scared to go back. I was too scared to face what was waiting for me. I was too scared to live. I was too scared to die.

scoundrel, and the trial judge evidently had no faith in his integrity. According to the evidence he had no authority to distribute abstracts or to issue binders upon any but approved binder forms. The document which he sent to Jones was supposed to be made out in duplicate, one copy of which was for the company's records and the other to be retained by Eden. The unfortunate circumstance is that Eden mailed his copy to Jones, who, because of his inexperience, may have considered it to be a policy. However, that circumstance would not entitle him to judgment against the company. The first knowledge Mid-States Insurance Company had of the transaction was after suit was instituted against Jones, and its records fail to disclose that it had ever issued any policy to Jones.

For the reasons indicated we think the court properly held that there were no effects in the hands of the garnishee belonging to Jones, and therefore the judgment of the Circuit Court should be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

1940

43857

WILLOW DEAN RENSSELAER for the
use of MATTHEW JONES,
Appellant,

v.

MID-STATES INSURANCE COMPANY,
a corporation,
Garnishee-Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

ON REHEARING

324 T.A. 389²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought garnishment proceedings against Mid-States Insurance Company. Trial by the court without a jury resulted in a judgment discharging the garnishee, from which plaintiff appealed. In our original opinion, filed November 13, 1947, we affirmed the judgment of the trial court in favor of defendant. December 12, 1947 we allowed plaintiff's petition for rehearing.

There is substantially no dispute as to the essential facts. Willow Dean Rensselaer was injured as the result of a collision between two automobiles, one of which was owned by Matthew Jones. Default judgment was entered against Jones in the amount of \$3000.00. Execution issued, which was returned no part satisfied, and about three months thereafter garnishment proceedings were instituted against defendant, which answered "no funds." Upon contest of the answer, the following facts were adduced by the several witnesses who testified for the respective parties. One Walter C. Eden was an agent for the Mid-States Insurance Company, with authority to write policies and issue binders on the company. About November 1, 1944 he telephoned Jones and stated that he wanted to sell him a public liability and property damage insurance policy. Jones and Eden did not know each other. As the result of the conversation Eden called on Jones at his home and received from

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him \$10.00 on account of the premium of \$28.00. The balance of \$18.00 was to be paid by Jones within sixty days. Shortly thereafter Eden mailed Jones an abstract of a public liability and property damage insurance policy with the Mid-States Insurance Company which bore the following legend on the back thereof: "Abstract of Automobile Insurance, Mid-States Insurance Company, Chicago, Illinois, No. C12-621, Expires November 1st, 1945 at 12:01 A.M. (Standard Time), Premium \$28.00, Insured Matthew Jones." The face of the abstract contained the following statement: "This is not a contract of insurance; it is an abstract of the written portion of the policy numbered below, as said policy stood at the date this abstract was prepared, and is furnished on the condition that it is an abstract only, conferring no rights on the holder and imposing no liability upon the company. Said policy is subject to endorsement, alteration, transfer, assignment and/or cancelation without notice to the holder of this abstract and without the recall of this abstract." Below this statement appeared the following: "This Company's Automobile Policy No. C12-621 has been issued to the insured named below in the amount and for the term specified." (Italics ours.) Then followed the heading "DECLARATIONS," under which appeared the following statements and items: "The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto. Item 1. Name of insured - Matthew Jones; Address - 4105 Vincennes Avenue, Chicago, Cook County, Illinois. The automobile will be principally garaged and used in the above town, county and state, unless otherwise specified herein. The occupation of the named

insured is Painter - Vitreous Enamel Products Co. Item 2. Policy Period: From November 1st, 1944 to November 1st, 1945, 12:01 A.M., standard time at the address of the named insured as stated herein. Item 3. The description of the automobile and the facts respecting its purchase are as follows: 1941 Chrysler Club Coupe, Serial No. 7,914,031, Motor No. C28-2810. Item 4. Coverages, Limits of Liability, Premiums: A. Bodily Injury Liability Coverage, \$5,000 each person and subject to that limit for each person, \$10,000 each accident, Premium, \$15.50; B. Property Damage Coverage, \$5,000 each accident, Premium, \$8.50; C. Medical Payments Included, \$500 each person, Premium, \$4.00; Total Premium, \$28.00. [Signed] Walter C. Eden, Agent."

Some time thereafter, in November, Eden mailed Jones a bill on his letterhead, dated November 1, 1944, for premium on policy No. C12-621 in the Mid-States Insurance Company covering public liability, property damage and medical reimbursement insurance on Jones' "1941 Chrysler Club Coupe," indicating the premium of \$28.00.

The accident out of which this litigation arose occurred on March 27, 1945. The \$18.00 balance of the \$28.00 premium was paid in Eden's office two days after the accident. Jones testified that he then called Eden to report the accident, and that Eden advised him "not to tell anybody I had insurance, and they might drop it." Eden, after learning of the accident, gave Jones an automobile policy with the Virginia Surety Company running from March 27, 1945, the date of the accident, to March 27, 1946, the premium for which was \$28.00, the amount Jones and his wife had previously paid to Eden and which Eden had accepted.

Frank Reynolds, employed as a claim superintendent for

the Mid-States Insurance Company, testified that at the time of these transactions Eden was an agent of the company, had authority to issue insurance policies on its behalf, and had written public liability and property damage insurance for the company during the period in question. About two months following the accident Jones came to the office of the Mid-States Insurance Company to report it. In response to the request of the company Jones, a few days later, brought the abstract of the insurance policy which Eden had sent to him, to Reynolds, who found upon examination of the files that policy No. C12-621 had on November 1, 1944 been issued to one Irving T. Flood, 710 East 92nd place, Chicago.

When called to explain this discrepancy Eden stated that he had issued the same policy number to Flood by mistake, and that although policy No. C12-621 should have been set aside for Jones in accordance with the abstract and the invoice sent to him, Eden failed or neglected to do so and accordingly the policy was never issued to Jones. He explained this circumstance by saying that "I would have issued it immediately upon receipt of payment which was due sixty days from receipt of the binder. The date on the binder is November 1, 1944. The policy would have been issued on the end of December or January 1st. This number was not issued and the number did not remain open. I did set aside a number on that at that time. The number I did set aside is C12-621 and that was on the first of November." The explanation offered by Eden is obviously untrue because Eden issued the policy number which had been set aside for Jones to Flood on November 1, 1944, which was long before Jones was required to pay the balance of \$18.00 due on the premium. Eden further testified that he was an agent for the Mid-States Insurance Company and empowered to write policies; that "the companies do not care whether their agents collect, when they collect, or

if they ever collect; we pay the company on a sixty-day basis and that is all they care about; they don't care if I never collect any premiums - they or any other company; all they want is what is due them. In other words, the insurance company bills me for the insurance that I write and it is my responsibility to collect. The insurance company did not bill me for the Jones' matter. They never had any notice of any financial indebtedness between myself and Jones or between Jones and the Mid-States. On November 1st, or shortly thereafter, I sent through the order to the Mid-States Insurance Company that there was money due on the one policy. By sending the order through, they would regard that there would be money due *** the Mid-States Insurance Company, from Irving T. Flood through my hands. On or about November 1, [1944], I did issue a policy of some type to Irving T. Flood." From the foregoing testimony it would appear that the Mid-States Insurance Company had no record of Jones' policy because of Eden's mistake or fraud in issuing policy No. C12-621 to Flood instead of to Jones.

In addition to the abstract of policy and invoice, Eden also sent Jones an automobile identification card in the Mid-States Insurance Company, stating that policy No. C12-621, which was to expire November 1, 1945, had been issued to Matthew Jones, the insured, 4105 Vincennes avenue, Chicago, Illinois, to cover a Chrysler automobile; on the back of the identification card was a printed \$5000 bail bond certificate issued by the National Surety Corporation.

The principal question presented is whether an oral contract for insurance was entered into between Eden and Jones as the result of the circumstances herein related. This question was urged in plaintiff's original brief and presented even more convincingly in the petition for rehearing. There is ample authority for the rule that oral contracts for this type of

insurance are valid in Illinois. As early as 1896 it was held in Firemen's Ins. Co. v. Kuessner, 164 Ill. 275, that "Corporations authorized by their charters to make insurance and issue policies are not precluded from entering into parol contracts to effect the same object. Whatever doubts might have heretofore existed as to the validity of parol contracts of insurance, it is now settled such contracts are valid." In Lauhoff v. Automobile Ins. Co. of Hartford, Conn., 56 F. Supp. 493, which involved an insurance company doing business in Illinois, the court said that "It is no longer doubted that insurance companies like other corporations may enter into parol contracts. These include preliminary agreements to issue new policies, to renew existing policies, or to transfer existing insurance from one location to another upon removal of property. [Citing Illinois cases upholding the validity of oral contracts.] * * * * If no preliminary contract would be valid unless it specified minutely the terms to be contained in the policy to be issued, no such contract could ever be made or would ever be of any use. The very reason for sustaining such contracts is, that the parties may have the benefit of them during that incipient period when the papers are being perfected and transmitted." [Eames v. Home Ins. Co., 94 U.S. 621.] See also to the same effect Wilson v. Hartford Fire Ins. Co., 188 Ill. App. 181; Hawthorne v. German Alliance Ins. Co., 181 Ill. App. 88; Continental Ins. Co. v. Roller, 101 Ill. App. 77.

In our original opinion we held that there was no contract of insurance but a contract to insure in the future. Upon a careful re-examination of the evidence, the salient portions of which have heretofore been fully set forth, we have concluded that the facts warrant, rather, the conclusion that Eden, who

was admittedly an authorized agent of the Mid-States Insurance Company, sold Jones a public liability and property damage policy under an oral agreement. The facts presented come squarely within the rule as to oral contracts of insurance enunciated in the early case of People's Insurance Co., v. Paddon, 8 Ill. App. 447, wherein the court said: "There is no statute in this State affecting the validity of such a contract; and the doctrine is now very generally recognized in this country that the rules of the common law present no impediment, providing that all the requisites prescribed by those rules as indispensable to every contract, be complied with. As respects a verbal contract of insurance, those requisites are substantially these: The minds of the respective parties must, at some instant of time, have met upon all the essentials of the contract. Those essentials are: the parties thereto; the subject-matter of insurance; the amount for which it is to be insured; the limits of the risk, including its duration in point of time, and extent in point of hazards assumed; the rate of premium; and generally upon all the circumstances which are peculiar to the contract and distinguish it from every other, so that nothing remains to be done but to fill up the policy and deliver it on the one hand, and pay the premium on the other. May on Ins. § 43; Hamilton v. Lycoming Mut. Ins. Co. 5 Penn. St. 337; Audibon v. The Excelsior Ins. Co. 27 N.Y. 216." Once the minds of the parties to the contract had met, it was immaterial whether a policy was issued or not. The rule supporting this proposition is stated in Hartford Fire Ins. Co. v. Farrish, 73 Ill. 166, as follows: "The agents of appellant agreed to insure the property against loss from fire, for a certain time, for a specified sum of money. The proposition was accepted by appellee, and the premium or consideration for

the insurance was paid. The parties were competent to contract, there was a good consideration, and a contract fairly entered into, based upon that consideration. We are aware of no other requisites which should be engrafted in a contract of this character to make it binding. We do not regard it indispensable, or even necessary, that a written policy should be issued in order to render the company liable. Taylor v. Merchants' Fire Insurance Co., 9 Howard, 390."

As applicable to these principles of law we find the following established facts to support the existence of an oral contract. The abstract mailed to Jones recited on its face that "This Company's Automobile Policy No. C12-621 has been issued to the insured named below in the amount and for the term specified." Mid-States Insurance Company is named as the carrier and Jones as the insured. Furthermore, at the time that Eden sent Jones his abstract or memorandum he also included therewith a bill for the premium due on the policy which again stated the object insured, the name of the company, the amount of coverage, the duration of the policy, the total premium and the number of the insurance policy issued. Also included therewith was an automobile identification card of the Mid-States Insurance Company naming Jones as the insured, giving the number of the policy, the expiration date, and the kind of automobile insured, with its serial number. All these circumstances indicated there was an oral contract of insurance. A similar situation was presented in Phillips v. Continental Auto Ins. Assn., 227 Ill. App. 46, wherein an agent of the company solicited plaintiff to insure his automobile against fire and other loss, for which insurance an oral contract was entered into. Plaintiff paid defendant's agent the premium, and the latter gave plaintiff a certain tag which indicated that the

automobile in question was insured. The tag was a metal disc upon which was printed the name of the insurance company and the phrase "Insured Car." The automobile in question was subsequently destroyed by fire before a policy issued. In holding that plaintiff could recover on the oral contract the court said that the metal tag was corroborative proof that the plaintiff was covered by insurance. The facts in the case at bar are even stronger than those in the Phillips case because the identification card issued to Jones specified the number of the insurance policy and other circumstances indicating that Jones was covered.

The real issue involved on this appeal is appropriately stated by plaintiff in its petition for rehearing as follows:

"When an insurance company appoints a general agent and clothes him with the full authority of such general agency, placing [him] in a position where he, by reason of his dishonest dealings, is enabled to mulct and rob the public, shall such loss resulting from the misconduct of the general agent within the apparent scope of his authority be borne by the innocent members of the public dealing with him or by the insurance company which created and made possible the situation endangering the public's welfare?"

Plaintiff relies on the principle that an insurer is responsible for the acts of an agent within the scope of his apparent authority, even when the agent is activated by fraudulent intent against the insurer which constitutes a breach of trust. So far as the public is concerned, the apparent authority of a general agent of an insurance company is not controlled by the actual limitations of his authority contained in private instruments of appointment of which the public can have no knowledge, but by the nature and extent of the apparent authority which it permits its agent to hold himself out as possessing. That is the established rule in this state. Hartford Life Ins. Co. v. Sherman, 123 Ill. App.

202; F. & M. Ins. Co. v. Chestnut, 50 Ill. 111; Adam v. Columbian Nat. Life Ins. Co., 218 Ill. App. 54; Hartford Fire Ins. Co. v. Farrish, 73 Ill. 166; and Aetna Ins. Co. v. Maguire, 51 Ill. 342. Both sides seem to agree that Eden was an irresponsible person, and the trial judge thought that "this agent ought to be in jail, for doing the things that he did to Jones"; but he was the insurance company's agent, and it was chargeable with his mistakes and misconduct. If Eden had reported the sale of this policy to the company, its records would have disclosed the transaction, and presumably a policy would have issued in due course; and whether Jones paid the balance of the premium would, according to Eden's testimony, have made no difference because the company would have billed the premium to Eden and held him liable for the payment of the entire amount.

Eden evidently proceeded on the theory that he had made an oral contract of insurance with Jones because he says that he sent Jones a notification of the cancellation of the policy, and he testified that he did not mail the policy to Jones because the \$18.00 balance due on the premium had not been paid. This contention is manifestly untrue because he assigned policy No. C12-621 to Flood and never even notified the company that a contract had been made with Jones or assigned any other policy number to Jones. Jones denied that he ever received any cancellation notice, and in the light of Eden's untrustworthiness the trial judge, if he had passed on that point, would certainly not have placed any credibility in Eden's testimony to the contrary.

For the reasons indicated the judgment of the Circuit Court is reversed, and judgment entered here against the garnishee Mid-States Insurance Company and in favor of the bene-

-11-

beneficial plaintiff Willow Dean Rensselaer in the sum of
\$3000.00 and costs.

JUDGMENT REVERSED AND JUDGMENT
HERE IN FAVOR OF BENEFICIAL
PLAINTIFF WILLOW DEAN RENSSELAER.

Scanlan and Sullivan, JJ., concur.

-11-

CHIEF OF POLICE, NEW YORK

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APPEAL FROM SUPERIOR COURT  
COOK COUNTY.

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534 1300

Plaintiff appeals from an order striking his amended complaint and dismissing his suit to restore him to membership in and presidency of Local 66 of the Elevator Starters and Operators Union of the Building Service Employees International Union, A.F.L., from which he claims he was wrongfully suspended by the defendant William L. McFetridge, president of the Building Service Employees International Union A.F.L., with which Local 66 is affiliated, pursuant to a conspiracy between McFetridge and other persons named in the amended complaint.

The amended complaint, filed February 24, 1947, alleged that plaintiff was then a citizen of the United States and from the year 1921 continuously until September 1942 had been a member in good standing of said Local 66; that in February 1941 he was elected president of the local and took office as such president and acted as such until his suspension by defendant McFetridge, as president of the international union; that during his incumbency as president of the local, numerous and serious differences - which need not be detailed - arose between himself and McFetridge in respect to the management of the union; that McFetridge made many threats, including a threat to remove plaintiff as president of the union; that in carrying out the latter threat McFetridge informed plaintiff that he was in possession of an anonymous letter stating that plaintiff was not a citizen of the United States, and that plaintiff, not being

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a citizen, could not be a member or president of the local; that plaintiff then exhibited to McFetridge "a certificate of citizenship issued by the Government of the United States to the plaintiff's father, which certificate showed that at the time when plaintiff's father obtained citizenship, he, the plaintiff, was of the age of less than 21 years, and thus he, together with his father, became a citizen of the United States," and produced further evidence showing that at the time plaintiff's father became a citizen of the United States, he, the plaintiff, was less than 21 years of age, and that plaintiff further stated to defendant McFetridge "that he, the plaintiff, is now and was, for many years past, since the date of his father's citizenship papers, a citizen of the United States"; that notwithstanding the evidence produced by plaintiff, McFetridge, in pursuance of the conspiracy charged, suspended plaintiff as an officer and member of Local 66 until such time as plaintiff presented adequate proof of his United States citizenship, and immediately, September 28, 1942, gave plaintiff written notice of his suspension; that plaintiff, "proceeding in accordance with the provision of the constitution of Local 66 and of the International, filed his appeal in writing and requested under the provisions of said constitution the right to appear before the delegates of the convention to be called in the City of Chicago in the month of October 1945"; that before appearing before the convention at the time and place set by the defendants, McFetridge informed the plaintiff that his appeal to the convention would not be heard by the delegates themselves; but by a committee appointed by McFetridge; that plaintiff, objecting to the appointment of a committee by McFetridge as unconstitutional, nevertheless appeared before the committee, which, without giving plaintiff an opportunity to appear before the delegates, reported to the convention that the appeal of plaintiff

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be denied, and this report was approved by the convention.

The constitutions of the international and local unions are exhibits to the complaint. The constitution of the international union (Article 7, section 9) vests the international president with "supervisory power over Local Unions and the membership thereof, with the right to suspend a Local Union or any of its members for violation of any section of this Constitution," and gives to the members suspended a right of appeal from the decision of the president within ten days thereafter to the General Executive Board. Article 14, section 5 provides, "All Local Unions shall provide in their Constitution and By-Laws that every member shall be an American citizen or such member shall agree to become a citizen of the United States as soon as he or she is eligible to citizenship." Article 3, section 3 of the constitution of Local 66 provides, "To be eligible for membership in this union, each applicant *** must be a citizen of the United States of America or must have his first papers and have proceeded expeditiously to obtain citizenship ***." The right of the international and local union to limit the membership to citizens of the United States is conceded, and therefore under the constitution of each union plaintiff was ineligible to membership unless he was at the time of his suspension a citizen of the United States. It was incumbent upon him to affirmatively allege that he was such citizen at the time of his suspension, for even though the defendants may have acted wrongfully, as alleged, - a matter we cannot decide - plaintiff has no standing in any court unless he was in fact entitled to retain his membership in the union. Plaintiff claims derivative citizenship through the naturalization of his father. Nowhere in the complaint is there a positive averment that at the time of his father's naturalization plaintiff was then a resident of the United States and under the age of 21 years. To meet this requirement plaintiff relies upon the allegations referred to

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above relating to the presentation to McFetridge of the certificate of the naturalization of his father and the production of other evidence to support his claim of citizenship. These allegations are merely recitals of steps taken by plaintiff to convince McFetridge of his citizenship and are not allegations of fact upon which citizenship can be based. If plaintiff relied upon the certificate of naturalization of his father he should have complied with Rule 13 (2) of the Supreme court governing the pleading of a judgment, decree or order of a state or federal court. However, an examination of the federal statutes governing naturalization proceedings, in force at the time of the naturalization of plaintiff's father, shows that the certificate of naturalization, if incorporated in the complaint, would not establish plaintiff's derivative citizenship through the naturalization of his father. The form of certificate of naturalization prescribed by statute (The Code of the Laws of the United States, in force January 3, 1925, Title 8, section 409) merely recites the finding of the court upon the facts essential to the naturalization of the father, and his admission as a citizen of the United States. On the stub of the certificate of naturalization is given the names, ages and places of residence of minor children, evidently taken from the allegations of the father in his petition for naturalization, and nowhere is there a finding or any provision for a finding by the court as to the ages of the children designated. It therefore follows that the notation of the age of plaintiff, if any, on the stub of the certificate of naturalization of his father, would not be evidence of the age of plaintiff, or of his citizenship. Provision is made by the federal statute (Title 8, section 409c (a)) for obtaining a certificate of naturalization by a child relying upon the naturalization of the father. There is no allegation of any attempt by plaintiff to obtain this certificate by compliance with the statute and thereby rendering himself eligible

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for reinstatement to membership. Although plaintiff alleges that he proceeded to effect an appeal in conformity with the constitution of the International - a mere conclusion - the complaint does not show that this appeal was taken within ten days, as required by the constitution. (Article 7, section 9, supra.). We consider further examination of the objections raised by defendants on their motion to strike the amended complaint unnecessary. The court did not err in sustaining defendants' motion and dismissing the suit.

The order is affirmed.

ORDER AFFIRMED.

Feinberg, J., concurs.

[illegible]

44288

CHARLES B. CLARK,
Appellee,

v.

NEW YORK CENTRAL RAILROAD
COMPANY, a corporation, and
THE PULLMAN COMPANY, a cor-
poration,

Appellants.

APPEAL FROM SUPERIOR COURT
COOK COUNTY.

3341A.391

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment for \$20,000 entered in an action under the Federal Employers Liability Act.

Plaintiff, a brakeman and flagman in the employ of the defendant railroad company, was on duty on a train leaving Grand Rapids, Michigan on January 11, 1946. A Pullman car, operated by the defendant Pullman Company, had been hurriedly transferred from a train which had just arrived in Grand Rapids to the train on which plaintiff was employed. Upper berth No. 6 in this car had not been securely locked. A passenger, Mr. Granetz, traveling to New York, stepped onto the Pullman seat and then onto the arm-rest of the seat, which was two feet from the floor, with one or two overcoats in his arm, in an attempt to place them on a hook at least nine feet above the floor. In so doing he grabbed hold of the upper berth, which came down about 18 inches, and, losing his balance, fell upon plaintiff, who was passing through the car in the performance of his duties. As a result plaintiff, who had long suffered from chronic infectious arthritis, with rigidity of the entire spine, according to a diagnosis at the Mayo Clinic conducted at Rochester in 1923 or 1924, was incapacitated for future work as brakeman or flagman.

It appears without contradiction that during the war period Pullman cars were transferred from incoming to outgoing

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trains, being cleaned during the switching operation. It was the duty of the porter on the incoming train to put the berths into position and lock them. When this could not be done because of lack of time, the duty rested upon the porter of the outgoing train. This porter testified that on this trip he only had five minutes to get the passengers on, and had no opportunity to look through the car before the accident occurred. The hooks between the upper berths on which Granetz attempted to place the overcoats were from nine to twelve feet from the floor. The seat is 18 inches from the floor and the arm-rest about six inches above the seat. Porters are instructed not to allow coats to be hung on the high hooks because they sway and are likely to strike passengers in the face. There is a small hook underneath the lamp next to the window on which an overcoat can be hung, and if more than one person occupies the seat the porter places the coats elsewhere. On the trip in question Granetz and three other passengers wished to play cards in the space of berth No. 6 and attempted to dispose of their overcoats before the arrival of the porter.

In the view we take of the case it is only necessary to consider defendants' objection that the court should have directed a verdict for them. They contend that the act of Granetz in attempting to place the coats on the hook nine feet above the floor by standing on the arm-rest of the seat was the sole proximate cause of plaintiff's injury; that the failure to close and lock the upper berth was not a contributing cause. The height of the hook from the floor shows plainly that it was not intended to be used by passengers, or any person, except possibly those occupying the upper berth when made up. It was inaccessible to persons on the floor of the car, and the upholstered seats and arm-rests were certainly never intended to be used as places upon which to stand while passengers or

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others were attempting to reach these hooks. The upper berth, when closed and locked, afforded no handhold for any person standing on seat or arm-rest and attempting to reach the hook, and it was only because the berth had been inadvertently left open that Granetz, by getting his hand in the opening, was able to get a handhold on the berth and bring it down. The berth was held in a nearly closed position by strong springs and did not fall or come in contact with plaintiff, and, in the absence of physical force applied by some person, did not create a danger to anyone. The use made of the seat, arm-rest and the open and unlocked upper berth was so unusual and so contrary to the purpose for which they were installed that provision to guard against the results of Granetz' unusual and unexpected use of them was beyond the requirement of due care. Brady v. Southern Ry. Co., 320 U. S. 476; Merlo v. Public Service Co., 381 Ill. 300, 318; Seith v. Commonwealth Electric Co., 241 Ill. 252; Briske v. Village of Burnham, 379 Ill. 193; Berg v. New York Central R. Co., 391 Ill. 52; Moudy v. New York Central R. Co., 385 Ill. 446; Dabrowski v. Illinois Central R. Co., 303 Ill. App. 31.

The trial court should have directed a verdict for defendants or have entered judgment for defendants notwithstanding the verdict. The judgment is reversed.

REVERSED.

Feinberg, J., concurs.

44327

HARLEY N. BRUCE,
Appellant,

v.

MUNICIPAL EMPLOYEES INSURANCE
ASSOCIATION OF CHICAGO,
ILLINOIS.

Appellee.

APPEAL FROM SUPERIOR
COURT COOK COUNTY.

33-136-391²

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT

Plaintiff appeals from a declaratory judgment construing a contract whereby he was made the exclusive underwriter and production manager of defendant in certain territory for a period of five years, commencing March 21, 1941.

Defendant was a small life insurance company. Shortly after the execution of the contract its power was extended to cover health, accident and hospitalization insurance. The original contract provided for the payment of renewal commissions on individual policies issued by defendant and procured by or credited to plaintiff, and specifically provided that the termination of the contract "shall not affect the right to renewal commissions on policies written prior to such termination." As group life, health, accident and hospitalization policies were issued, supplements to the original contract were executed covering the first and renewal commissions on the specific policy named in the supplement and providing in substantially similar language that the commissions/^{be} paid or allowed "as long as the business remains on the books of the company, either continuously or by reinstatement." The group policies were issued to employers, to labor unions and to associations of municipal employees, and certificates of insurance were issued to the individual employee or member covered

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4. policy of non-interference in the
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by the policy. In at least one instance - the policy issued to the Bluebird Coach Lines, Inc., - all the employees were automatically covered and the individual premium chargeable against the employee was deducted from his pay and remitted by the employer to the insurer. In all cases of municipal employees where payroll deductions were not permissible it was necessary to collect the individual premium from the respective employees, the charge for this collection being 5 per cent.

Where employees or members were not covered by the group policies automatically, solicitation of the employees or members of the groups insured was necessary and such solicitation was an obligation of the plaintiff and performed by him and his employees at his expense, except in the case of Group Policy No. 116 issued to Division No. 308, Elevated Railway Employees, where the officials of the union did the soliciting, apparently without expense to either of the parties to this litigation.

In connection with the policies insuring groups of patrolmen and firemen of the City of Chicago, plaintiff agreed to handle without further compensation all claims and losses under the policies until at least 40 per cent of the members of the respective groups covered by the policies were insured and, at the request of the insured, continued to handle such claims after the members insured exceeded 40 per cent of the respective groups. After the termination of the contract, March 31, 1946, defendant performed the full administrative duties - "settlement of claims, the handling of collections as they came in, the making up of billings and returning them to the collectors and so forth" - previously performed by plaintiff in respect to these policies and has deducted from commissions due to plaintiff thereon 5 per cent of the premiums on which plaintiff's commissions were based as compensation for such services.

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By its decree the court found that under the contract plaintiff assumed obligations and duties such as the collection of premiums, the settlement and adjustment of claims and losses under certain policies, and the performance of other administrative work - not specified in the decree or shown by the evidence - normally devolving upon the defendant, and in consideration of the assumption and performance of such additional duties under certain policies plaintiff was paid a higher rate of commission than he would otherwise have received; that such administrative duties, other than collection of premiums, were performed by plaintiff in connection with Master Group Contracts 106, 109 and 128 until the termination of the contract on March 21, 1946, and thereafter by the defendant, and that the actual cost to defendant of performing such duties was "5% of the premiums received by defendant on the individual certificates credited to the plaintiff under such Master Group Contracts"; that plaintiff was not entitled "to first year or renewal commissions on premiums received by defendant from any individual certificate issued or procured by defendant after March 21, 1946 under any Master Group Contract"; that after the termination of the contract plaintiff's commissions on Master Group Contracts 105, 106, 108, 109, 128, 129, 132, 133, 134 and 135 were to be charged with a collection fee equal to 5 per cent of the premium upon which such commissions were calculated; that plaintiff did not procure or solicit or in any manner aid in the procurement or solicitation of Master Group Life Contract 501 and is not entitled to premiums received by defendant upon individual certificates under such contract after March 21, 1946; that plaintiff is entitled to commissions on premiums received from individual certificates credited in accordance with the provisions of the decree, converted to individual policies after March 21, 1946, only if such conversion is effected without

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solicitation by an agent of defendant.

Plaintiff objects to the provisions of the judgment charging him with the administrative expense exclusive of costs of premium collections, under policies 106 and 109, covering Chicago patrolmen, and 128, covering city firemen, and charging him with collection expense of 5 per cent on commissions on group policies 132, 133 and 134, and denying him first year and renewal commissions on premiums received by defendant from any individual certificate issued or procured by defendant after March 21, 1946 under any master group contract, and denying him commissions on premiums received by defendant upon individual certificates under group policy 501 after March 21, 1946. The intent of the parties, as expressed in the contract was "to relieve the Association (defendant), to the greatest practical degree, of actuarial, accounting, collection and all other normal costs incident to an aggressive program for the expansion and development of business." In conformity with this intent plaintiff undertook at his own expense to handle claims and losses under the patrolmen's and firemen's policies until the membership insured reached 40 per cent of the members of the respective groups, and thereafter, at the request of the insured, continued to handle such matters without expense to the insured or to the defendant. These policies, like all the group policies issued by the defendant, were annual policies, subject to renewal at the end of each year. The handling of claims and losses by the plaintiff after the members insured exceeded 40 per cent of the membership from year to year became a part of the contract of the insured with defendant and an obligation of plaintiff. Upon the termination of plaintiff's contract and the assumption of these duties by the defendant, a reasonable charge for the work or the actual costs of same became a proper charge against plaintiff's commissions. The evidence shows this charge to be 5 per cent of the commissions to which plaintiff is entitled

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on these policies. Deacon v. Equitable Life Assur. Society, 86 S. E. 91 (Ga. App.); Ryan v. Phoenix Mut. Life Ins. Co. 35 N.Y.S.2d 792 (N.Y. App. Div.); Geisler v. Equitable Life Assur. Society, 169 Va. 118.

Plaintiff concedes the correctness of the provisions of the judgment charging him with collection expense on all the group policies specified in the judgment except policies 132, 133 and 134. These three policies covered groups of employees of Cook County and the City of Chicago. Payroll deductions of premiums on the certificates of the individual employees could not be made. As early as 1945 defendant advised plaintiff of the necessity of paying a fee for the collection of the individual premiums on policies under which there could not be a payroll deduction. There is sufficient evidence in the record justifying a finding of the acquiescence of plaintiff in this arrangement and in the necessity of the collection expense in connection with these three policies. The charge, therefore, was proper.

The judgment provision denying plaintiff the right "to first year or renewal commissions on premiums received by defendant from any individual certificate issued or procured by defendant after March 21, 1946 under any Master Group Contract," is, upon the record before us, proper as to all policies except 125, covering the Bluebird Coach Lines, Inc. employees, and 116, covering members of Division 308, Elevated Railway Employees. Under the terms of the Bluebird policy, employees of the corporation were covered automatically by the policy, and the premiums due from the individual employee were deducted from the payroll and remitted to defendant without expense to it or plaintiff. Under the policy of Division 308, new members were added without solicitation by plaintiff or defendant. This solicitation was done through the union, and the new members

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reported to defendant. There being no solicitation of new members by plaintiff or defendant under these policies, plaintiff is entitled to commissions on new members covered by the policies so long as they remain in force or the business remains on the books of the company.

Plaintiff's objection to the provisions of the judgment denying him commissions on premiums received by defendant upon individual certificates under policy 501 after the termination of the contract, March 21, 1946, cannot be sustained. By the express provisions of the contract he became the "exclusive underwriter and production manager in the territory hereinafter defined," and was therefore entitled to commissions during the life of the contract on all policies issued by defendant. This right was recognized by defendant by the payment of commissions on premiums received up to March 21, 1946. The right to commissions after the termination of the employment must be found in express provisions of the contract. Locher v. New York Life Ins. Co., 200 Mo. App. 659; Geisler v. Equitable Life Assur. Society, 169 Va. 118. Our attention has not been called to any provision of the contract or any supplement or addendum to the contract supporting plaintiff's claim to commissions under this policy after the termination of his contract, and our examination of the record has revealed none.

The judgment is reversed and the cause remanded with directions to render a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

Feinberg, J., concurs.


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APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

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and to grant a new trial, setting up in the affidavit that subsequent to the entry of the judgment the real estate broker remembered that he had procured the lease from defendant and turned it over to his lawyer for use in a suit brought by him for his real estate commissions. The alleged lease relied upon - a copy of which was attached to the affidavit, the original being produced on a hearing of the motion - is a typewritten receipt of eleven lines purporting to be signed by the alleged landlord on March 15, 1943 and acknowledging the receipt of \$117.00, "being the deposit of the first month's rent and lease of premises," and further reciting: "Said lease is for six years." No other terms or provisions of the lease are stated in the receipt. The essentials of the vacation of a judgment and the granting of a new trial because of newly discovered evidence are stated in People v. Dabney, 315 Ill. 320, as follows: "First, it must appear to be of such conclusive character that it will probably change the result if a new trial is granted; second, it must have been discovered since the trial; third, it must be such as could not have been discovered before the trial by the exercise of due diligence; fourth, it must be material to the issue; and fifth, it must not be merely cumulative to the evidence offered on the trial." Defendant does not meet these requirements. As heretofore stated, there is nothing in the record, except the statements of the trial court on the hearing on defendant's motion, to show the issues of fact presented on the trial. The statements of the trial court show that the alleged lease now relied upon is a contradiction of the testimony of the defendant and her witness, the real estate broker. There is nothing in defendant's affidavit or in the statement of the court to show that the alleged lease now relied upon would be conclusive of defendant's



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right to possession of the premises. In the absence of a proper showing by defendant we must presume that the court ruled correctly in denying defendant's motion.

The order is affirmed.

ORDER AFFIRMED.

Feinberg, J., concurs.

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44382

ROBERT MADDEN and LENA MADDEN,  
Appellants,

v.

JAMES CHANDLER, WILLIE MARION  
CHANDLER, CLARENCE CHANDLER and  
ALBERT J. HORAN, Bailiff of the  
Municipal Court of Chicago,  
Appellees.

APPEAL FROM CIRCUIT COURT  
COOK COUNTY.

33414.893

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from a decree dismissing for want of equity, on hearing before the chancellor, their complaint seeking a permanent injunction staying the execution of a writ of restitution issued on a judgment in a forcible detainer action in which plaintiffs herein were defendants and in which judgment by consent was entered for the plaintiff, the writ of restitution being stayed four months.

The complaint, filed at the expiration of the stay of the writ of restitution, alleged that plaintiffs herein were in possession of the premises involved under a written lease executed April 14, 1942, which was still in full force and effect. The copy of the lease attached to the complaint shows that it expired April 30, 1943, and there is no allegation of fact showing an extension of the lease beyond that date. The complaint further charges that upon the institution of the forcible detainer action, plaintiffs by their attorney asked for a jury trial and intended to rely on their written lease and other defenses; that they appeared in the trial court on August 15, 1947, where without their knowledge or consent the jury trial was waived and judgment entered by consent requiring them to vacate the premises on December 15, 1947. On the filing of the complaint a temporary injunction was issued without notice. On motion of the defendants

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herein to dissolve the injunction the attorney who appeared for plaintiffs herein on the trial of the forcible detainer action testified that he was representing the attorney whose appearance had been entered and that the consent judgment was entered after conference with and consent of the plaintiffs herein. One of the plaintiffs testified contradicting the testimony of the attorney. The trial judge, who saw and heard the witnesses, was in a better position to determine the issue of fact than is this court. We cannot say his finding is against the manifest weight of the evidence. Other matters appearing of record supporting the decree appealed from need not be discussed.

The decree is affirmed.

AFFIRMED.

Feinberg, J., concurs.

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44427

JACK W. FISHER,  
Appellee,

v.

MICHAEL ALLEN,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

33-131332

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$200 entered in plaintiff's action for damages to his automobile sustained in a collision with the automobile of a third person under the following circumstances.

Plaintiff was driving south in the west drive of Jackson Park in the City of Chicago about 25 feet behind the car of Ernest L. Sandstrom, both cars traveling approximately 20 miles per hour. The pavement was covered with about a foot of snow. There were drifts on each side of the driveway and snowplows were in the northbound lane. Defendant was driving north in this lane behind the most northerly snowplow, which he says had stopped to wait for two snowplows following. Plaintiff says that the two snowplows were going north. Whether the snowplow was standing still or moving, defendant attempted to pass it with his car in the northbound lane until it struck certain ruts which threw it into the southbound lane, where the rear end struck the front of Sandstrom's car, which had almost come to a stop, pushing it back a few inches. Defendant's car passed on to the north some distance, when it was stopped. A couple of seconds after the collision of defendant's car with the Sandstrom car, plaintiff's car crashed into the rear of the Sandstrom car and was damaged.

The complaint does not allege that plaintiff was in the

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2. The second part of the report is a detailed description of the methodology used in the study. It includes information about the sample, the data collection methods, and the statistical analysis.

3. The third part of the report is a discussion of the results of the study. It presents the findings of the research and discusses their implications.

4. The fourth part of the report is a conclusion. It summarizes the main findings of the study and provides recommendations for future research.

5. The fifth part of the report is a list of references. It includes all the sources of information used in the study.

6. The sixth part of the report is an appendix. It contains additional information that is not included in the main body of the report.

7. The seventh part of the report is a glossary. It defines the key terms used in the study.

8. The eighth part of the report is a list of figures. It includes all the charts and graphs used in the study.

9. The ninth part of the report is a list of tables. It includes all the tables used in the study.

10. The tenth part of the report is a list of abbreviations. It includes all the abbreviations used in the study.

11. The eleventh part of the report is a list of symbols. It includes all the symbols used in the study.

12. The twelfth part of the report is a list of footnotes. It includes all the footnotes used in the study.

13. The thirteenth part of the report is a list of appendices. It includes all the appendices used in the study.

14. The fourteenth part of the report is a list of references. It includes all the sources of information used in the study.

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exercise of due care. It charges in separate paragraphs negligence of the defendant and wilful and wanton conduct in the operation of his car. Defendant was not driving his car at an unwarranted speed and, according to plaintiff's testimony, was going approximately only five miles per hour faster than plaintiff and Sandstrom. So far as the evidence shows, defendant was at all times, until his car skidded because of the ruts caused by the snow or ice, in the northbound lane of the driveway and had ample room in that lane to pass the snowplow. There is no evidence of wilful and wanton conduct, and under the authority of Bradley v. Madden, 333 Ill. App. 153 (abst.), decided by the Second Division of this court, the collision with Sandstrom's car being the result of the skidding of defendant's car because of the snow on the pavement, there is no evidence of negligence in the operation of defendant's car. Plaintiff testified that, at the speed he was going and under the conditions existing at the time, he could stop his car in 12 or 15 feet. It was his duty to keep his car under such control and far enough behind the Sandstrom car so that he could avoid collision with it in the event of the sudden stopping of the Sandstrom car. Failure to do this has been held to be contributory negligence as a matter of law, by the Third Division of this court in Kronenberg v. Coca Cola Bottling Co., 324 Ill. App. 519 (abst.) and Jirkovsky v. Elman, 323 Ill. App. 282 (abst.).

The judgment is reversed.

REVERSED.

Feinberg, J., concurs.





44238

ELIZABETH TOBIN, Admx. of the  
Estate of MARTIN TOBIN, Deceased,  
Appellant,

v.

CONSOLIDATED FREIGHT COMPANY, a cor-  
poration,  
Appellee.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

33-1A-394

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action in the Circuit Court of Cook County against defendant, for the wrongful death of Martin Tobin, alleged to have been caused by the negligence of defendant's employee, driving a tractor used by defendant in its business. Upon a trial with a jury there was a verdict for \$10,000 against defendant, and judgment entered in favor of plaintiff upon the verdict. Within the time allowed by statute defendant filed its written motion for judgment notwithstanding the verdict and, in the alternative, for a new trial. Upon a hearing of the written motion the court allowed the motion for the entry of a judgment notwithstanding the verdict and entered judgment accordingly against plaintiff for costs. The motion for a new trial was denied. From the judgment notwithstanding the verdict plaintiff appeals.

The only question presented upon this appeal is whether there is any evidence in the record to sustain plaintiff's claim. If there is, it was the duty of the court, having overruled the motion for a new trial, to allow the judgment on the verdict in favor of plaintiff to stand.

It appears from the evidence that defendant employed one Carl T. Johnson, whose duty it was to drive defendant's tractor, with loaded trailer attached, to such destinations as he would

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from time to time be directed; that he had made 20 to 25 trips to Chicago with loaded trailers; that on the day of the accident in question he drove from Lansing, Michigan, to defendant's terminal yards on Archer Avenue in Chicago; that after the deposit of his loaded trailer in the terminal yards, he told defendant's chief dispatcher stationed at the terminal yards in Chicago and a young lady clerk in the office that he was going to the Dalton Hotel to sleep, that he would be there subject to their call. On his way to the hotel with the tractor, he ran over decedent, who was standing on a safety island waiting for the approach of a street car, and the jury found defendant guilty of negligence which caused the death of plaintiff's decedent. It appears that Johnson had been in the habit of going either to the Dalton, Calvert or Olympia Hotels in the neighborhood of 14th and State Street and 14th and LaSalle Avenue in Chicago, on each of the trips he made with these loads to Chicago, after depositing the load in the terminal yards; that he took the tractor with him when he went to these hotels, which were located approximately 2 or 3 miles from the company terminal. He testified that he got his orders from Jack Mahoney, the chief dispatcher; that "Mahoney had charge of the drivers while I was working there and gave us our orders as to when and where to go"; that on his second or third trip into Chicago, around the latter part of October, 1944, he had a conversation with Mahoney as to what he was to do with the tractor; that the conversation was in the office, and that Dorothy, the clerk who made out the manifests, and some of the other clerks were there. He testified he had been to the restaurant and came in and told Mahoney that some fuses had been stolen out of the tractor; that he left the tractor when he went in to eat; that Mahoney said, "We can't be responsible for those things. We have to hire fly-by-night workers for dock work. \* \* \* My advice is for you to take the tractor with you and lock it up. \* \* \* If you don't take it



out you are going to find it bumped up. We can't help that.  
\* \* \* It is apt to be banged up---buried back in the trailers.  
We can't have them around here. \* \* \* If we have all the  
tractors around here we won't have no place to put the trailers.  
You can't get out. You would find it banged up or buried back  
here. You can't get it when you want it." He further testified  
that from that time on he took his tractor with him whenever  
he went to the hotel.

Mahoney, testifying for defendant, denied the conversation related by Johnson. He also testified that he was chief dispatcher at the terminal yards and, as such, had the duties of dispatching the various men who were driving; that he was dispatcher strictly with the men doing city work and "didn't have anything else to do over the road men;" that Johnson was not a city driver; that he never told any driver of an over-the-road tractor what he should do with it after he once deposited his load.

Johnson's testimony and Mahoney's testimony presented an issue of fact which was within the province of the jury to pass upon. It was therefore error for the court to enter judgment notwithstanding the verdict. Merle v. Public Service Co., 381 Ill. 300; Shannon v. Nightingale, 321 Ill. 168; and Elberg v. Standard Oil Co., 331 Ill. App. 207. If the jury believed Johnson, then Johnson was performing a duty directed by Mahoney--namely, to take the tractor out of the terminal yards and take it with him wherever he would go. Under such circumstances, Johnson had a duty towards his employer to protect the employer's property, the discharge of which duty must be considered to be in performance of his line of duty. In Metzler v. Layton, 378 Ill. 88, at p. 91, it is stated:

"The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business, or the care of his property, is justly held responsible when the servant \* \* \* inflicts an unjustifiable injury on a third person."

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Taking the tractor with him to his hotel, under these circumstances, cannot be considered acting outside of the scope of his employment nor a substantial deviation from his line of duty. Moran v. Borden Co., 309 Ill. App. 391, 395; Freehill v. Consumers Co., 243 Ill. App. 1, 7; Gillis v. Jurzyne, 284 Ill. App. 174, 180.

Defendant in its brief does not question or argue the propriety of the court's ruling on the motion for a new trial and upon oral argument expressly waived objections to the ruling. We, therefore, conclude that the judgment order of May 8, 1946, entered upon the verdict of the jury in favor of plaintiff is the correct judgment. The judgment notwithstanding the verdict entered April 3, 1947, is reversed and the cause remanded with directions to reenter the judgment in favor of plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer, P. J., concurs.

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44341

PERCY PANARSKY,  
Appellant,

v.

LONDON GUARANTEE AND ACCIDENT  
COMPANY LIMITED,  
Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

33-141-394<sup>2</sup>

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment of the Municipal Court of Chicago upon a directed verdict of not guilty, in an action on an insurance policy issued by defendant, covering loss by robbery. At the close of plaintiff's evidence the court denied a motion to direct a verdict, holding there was some evidence sufficient to go to the jury. At the close of all the evidence defendant renewed its motion to direct a verdict. The state of the evidence upon the question of plaintiff's compliance with the terms of the policy was no different than at the close of plaintiff's case. The court granted the motion, and a verdict of not guilty was returned. Upon the hearing of the motion for a new trial, the record for the first time discloses defendant urged the point that plaintiff had not proven compliance with the terms of the policy; that the evidence at best merely proves a waiver by defendant of the conditions imposed by the policy, which is not proof of compliance; and that having alleged compliance, it was incumbent upon plaintiff to prove it and not rely upon proof of waiver without a proper averment in the complaint of such waiver. Plaintiff then asked leave to file an amendment to the complaint to meet the proof, which defendant contended constituted waiver. The court denied leave.

It appears from the evidence for plaintiff that on February 28, 1946, defendant wrote to plaintiff's lawyer that in accord-

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ance with an agreement reached in Judge Hackett's courtroom on February 21, 1946, there was attached to the letter a copy of the document found in the files of defendant signed by plaintiff. It is headed "Notice and Particulars of Burglary, Theft, Larceny, or Robbery under Policy No. -----, given pursuant to agreements and conditions of policy." Each question appearing in the form submitted by defendant is answered by plaintiff, and the particulars of the robbery are outlined in the answers. The form does not provide for an oath before a notary public or other person authorized to administer oaths.

The complaint alleged that plaintiff had complied with all of the conditions required by the policy of insurance, and defendant in its answer denied that plaintiff had so complied. Plaintiff testified that the form of notice and proof referred to was the only form he received from defendant, and that the form was received by him in a letter dated April 3, 1945, from defendant, which stated: "In order to have full information regarding the loss of \$1,360.00, mention of which you made to the Company under date of April 2nd, we are enclosing loss blanks. Kindly fill out the same completely in duplicate and return original and duplicate to this office as soon as possible in order that we may give the claim attention." There is no proof of any other form sent by the company required to be executed by plaintiff. If defendant had sent any other form that required plaintiff's oath, it was within the power of defendant to produce such evidence. It did not do so, and there was, therefore, sufficient evidence standing uncontradicted to prove substantial compliance with the terms of the policy.

Weininger v. Metropolitan Fire Ins. Co., 359 Ill. 584. Upon this state of the record the court should have submitted the cause to the jury. Under the Civil Practice Act, par. 170,



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§46, chap. 110, Ill. Rev. Stat. 1947, plaintiff was entitled to amend the complaint, and the court should have allowed the amendment. Gillett v. Williamsville State Bank, 310 Ill. App. 395; Wiedow v. Carpenter, 310 Ill. App. 342.

The judgment of the Municipal Court is reversed and the cause remanded for further proceedings in conformity with the views herein expressed.

REVERSED AND REMANDED.

Niemeyer, P. J., concurs.

The first of these is the fact that the  
 government has been unable to secure  
 the necessary funds to carry out its  
 policy of non-interference in the  
 internal affairs of the country.  
 This has led to a situation where the  
 government is unable to pay its  
 debts and to maintain its  
 financial stability.

The second of these is the fact that the  
 government has been unable to secure

HUDIE HOSKINS,  
Appellee,  
v.  
JACK ZIMMERMAN,  
Appellant.

3341A.395

Plaintiff brought this action in the Circuit Court of Cook County against defendant, for injuries sustained through the alleged negligence of defendant in the operation of his automobile along 55th Street at the intersection of Wabash Avenue, striking plaintiff and knocking him to the ground. There was a trial with a jury and a verdict for \$10,000 for plaintiff, upon which judgment was entered, and from which defendant appeals.

Over objection of defendant Exhibit 6 was received in evidence, which was a police report of the accident, made by Officers Edward Moore and Roland Schmoes. The two officers in question testified they obtained the information noted in the report from

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.



2.

the defendant, at the hospital where the injured party was taken shortly after the accident occurred; that before testifying, each of them had read the report and refreshed their recollection. Officer Moore was asked by plaintiff the following questions:

"Q. Now, with reference to the intersection of 55th--- or Garfield and Wabash, did you learn from the driver, the defendant, Mr. Zimmerman, where this accident took place; where it took place away from or on the crosswalk?

A. Mr. Zimmerman stated it occurred at the crosswalk.

Q. Did you so note in your report?

A. I did.

Mr. Jacobs: I object and ask it be stricken.

The Court: It may stand.

Q. As part of your routine do you ask the driver how far the victim was away from the car when he first saw him?

A. I did. I interrogated Mr. Zimmerman with reference to that question. He said the man that was struck was about three feet in front of him before---

Q. And did you so note in your report?

A. I did.

Mr. Jacobs: To that I object.

The Court: Let it stand."

On redirect examination he was asked:

"Q. Officer, at the time you made your report did you make a diagram of the position---showing the position of his car as Mr. Zimmerman described to you?

A. Yes, sir.

Q. And does that appear in the report you made that night, the one you hold in your hand?

A. Yes.

Mr. Jacobs: To that I object.

The Court: Overruled.

Q. Did you ask Mr. Zimmerman whether it happened away from or at the crosswalk?



Mr. Jacobs: To that I object, he already testified.

The Court: He answered it was at the crosswalk.

Q. Did you on the report which you have in your hand in your own handwriting, that night, from the information you received from him, make the notation as to whether it happened at the crosswalk or away from the crosswalk?

Mr. Jacobs: To that I object, and I move at this time that a juror be withdrawn and a mistrial declared.

Mr. Gleason: This is all information from the defendant himself, the man he talked to.

The Court: I think you asked him already where it occurred and if he made the notation.

Mr. Gleason: That's right, but it is just that I don't want any confusion between any report counsel reads from which this officer knows nothing about.

Mr. Jacobs: To that statement I object. And I would like a ruling on my motion to withdraw a juror.

The Court: The motion to withdraw a juror is overruled, and he may answer.

Q. Did you make that notation?

A. Yes, sir, it was at the crosswalk." (Italics ours.)

It appears from the statement made by the court in passing upon the motion for a new trial, that Exhibit 6 was not read to the jury. The trial judge's statement is:

"Now, it wasn't read to the jury for the obvious reason it contained a lot of matters that were incompetent and irrelevant, that would certainly have been prejudicial."

Plaintiff takes the position that since it was not read to the jury, although the exhibit was received in evidence, the jury did not have it or know of its contents. This position is untenable. Plaintiff apparently was not satisfied with having Officer Moore testify to the conversation he had with defendant at the hospital, after refreshing his recollection from the report he made - namely, Exhibit 6 - but, as indicated by the questions and answers, he insisted on having the witness testify that ~~what~~ he testified to was noted in the report, thus offering corroboration of the witness' testimony by the report, and the equivalent of



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reading the contents of the report to the jury. To make it certain that the jury would know the contents of the report, and that it conformed to the testimony of the officer, counsel for plaintiff, in his argument to the jury, said:

"You see these documents cannot go with you into the jury room. Don't think that because these papers don't go into the jury room with you where you can read them over again, that they haven't definite probative value. \* \* \* I have said to you that the Park District Officers told you that they put down on their report what the driver, Zimmerman, told them: That this happened at the crosswalk."

This violates the well settled rule of evidence.

D'Oranzo v. Lacny, 330 Ill. App. 333, is controlling upon this question. In that case, identical with the instant case, there was a sharp conflict as to whether the accident occurred in the crosswalk or somewhere near the middle of the block. The police officers, having refreshed their recollection from the police report they made in that case, testified to a statement made by plaintiff and defendant in each other's presence at the hospital, and noted the information given them on the police report, which showed that plaintiff had crossed the street near the middle of the block instead of at the crosswalk. The report was received in evidence over objection, and we there said:

"Where a witness can testify that a report or document, made by him at the time of the occurrence, refreshes his recollection, the document or report may only be used for that purpose and is not otherwise admissible in evidence."

Error has been assigned to the giving of instruction No. 8 for plaintiff, which reads:

"You are instructed that in passing upon testimony of all the witnesses who have testified in this case, you have the right to take into consideration any interest which said witnesses may have growing out of their relation to any of the parties to this suit, if any such is shown, and give to the testimony such weight only as you think it entitled to under the evidence in this case." (Italics ours.)



5.

The only witnesses to the accident for defendant were his two brothers, and for the plaintiff, two witnesses who were not related or even acquainted with plaintiff before the accident. The instruction, therefore, should not have been given, since it singles out the witnesses for defendant and their relationship to him. Such an instruction has been condemned in Roberts v. Chicago City Ry. Co., 262 Ill. 228; Walsh v. Chicago Railways Co., 294 Ill. 586; Witzholz v. Yellow Cab Co., 519 Ill. App. 115.

Other errors assigned, we deem unnecessary to discuss. For the errors indicated, the judgment of the Circuit Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Niemeyer, P. J., concurs.

[illegible][illegible]

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APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

COOK COUNTY.

33-46952

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Plaintiffs appeal from an order of the Circuit Court of Cook County dismissing their amended complaint for want of equity, in an action to enjoin defendants from paying a dividend to Class A and Class B stockholders of the defendant corporation, pursuant to resolution adopted by the board of directors of said company on August 7, 1947. The amended complaint alleged that the stated capital of the defendant corporation was \$330,400; that the net assets of the company at the time of the filing of the complaint were not in excess of \$250,000; that the net assets appearing in an audit report of the defendant company dated July 2, 1947, were \$315,489.30; that the assets set up in said annual report are grossly and excessively over-valued; that the net assets disclosed by a previous audit report of the company dated July 22, 1946, were \$213,886.21; that the authorized and issued capital stock of the company is 1,929 shares of Class A stock, par value of \$100 per share, 940 shares of Class B preferred stock, par value of \$100 per share, and 385 shares of Class C common stock of no par value, for which the consideration received by the corpora-

THE UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE

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OFFICE OF THE SECRETARY
WASHINGTON, D. C.

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tion was property of the value of \$38,500, making the total stated capital of the company \$330,400; that on August 7, 1947, the board of directors of the company adopted a resolution directing the officers of the corporation to pay the holders of Class A stock a dividend of \$1.50 per share and the Class B stockholders 50¢ per share; that the declaration of said dividend was in violation of and the payment of such dividend would be in violation of paragraph (a), section 41 of the Business Corporation Act, ch. 32, Ill. Rev. Stat. 1947; that the payment of such dividend would further reduce the net assets of the company below its stated capital. The amended complaint prayed for an injunction to restrain the officers from paying the dividend so declared. Attached to the complaint, as amended, was a copy of the annual report of the company to the Secretary of State of Illinois, dated March 7, 1947, in which, under oath, the stated capital was declared to be \$347,085.

Defendants filed a motion to dismiss the complaint, as amended, which motion was sustained. The motion, thus made, admitted for the purpose, the facts well pleaded in the complaint.

The definition of "stated capital", appearing in the Business Corporation Act, paragraph (k), section 2, chapter 32, reads:

"'Stated capital' means, at any particular time, the sum of (1) the par value of all shares then issued having a par value and (2) the consideration received by the corporation for all shares then issued without par value * * *."

The definition in the statute is controlling. The complaint as already indicated, alleged that the stated capital of the company was \$330,400. The exhibit attached to the complaint, as amended, consisting of the annual report of the company to the Secretary of State, showed a stated capital of \$347,085. The complaint, having alleged that the net assets of the company at no time exceeded \$250,000, set up a clear violation of paragraph (a),

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section 41 of the statute, which reads:

"No dividend shall be declared or paid at a time when the corporation is insolvent or its net assets are less than its stated capital, or when the payment thereof would render the corporation insolvent or reduce its net assets below its stated capital."

Defendants contend that the stock voting trust agreement, which is also attached to the complaint as an exhibit, provides for the payment of the dividend to the stockholders; that it is a contract binding upon plaintiffs and the basis upon which the directors were justified in the declaration of the dividend; that they also were justified on the basis that the real estate, furniture and furnishings turned over to the corporation in payment of stock are part of the capital and a part of the assets of the company; that there is no averment in the complaint as to the fair valuation of such assets at the time of the filing of the complaint that would indicate any insolvent condition on the part of the company. These contentions are without merit.

It will be noted that paragraph (a) of section 41 of the Act is in the disjunctive. It is that no dividend shall be declared or paid at the time when the corporation is insolvent, "or" its net assets are less than its stated capital, "or" when the payment thereof would render the corporation insolvent, "or" reduce its net assets below its stated capital. The articles of incorporation and the stock voting trust agreement, attached to the complaint, which provided for the payment of dividends, could not authorize a violation of the statute.

People v. Universal Service Assn., 365 Ill. 542. It was there said:

"The Secretary of State in issuing a charter acts in a ministerial capacity, and all powers granted beyond the statute are void. * * * In any event the charter could not go beyond the terms of the act, and a provision for payment of dividends or 'natural increase' would be void."

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The same reasoning applicable to a charter issued by the Secretary of State must necessarily apply to a stock voting trust agreement which contravenes the provisions of the statute.

It necessarily follows, from the views expressed, that the order of the Circuit Court striking the complaint and dismissing it for want of equity is erroneous. The order is reversed and the cause remanded with directions to order an answer to the complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer, P. J., concurs.

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The same reasoning applies to the
theory of state must necessarily be based on
trust agreement which cannot be broken
it is really foolish, and the view of
order of the world is not at all
to be taken as a guide for the
the other hand, the world is not at all
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There is a great deal of

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ALICE CONLEY, as Administratrix of
the ESTATE OF CHARLES CONLEY, Deceased,
ALICE CONLEY, Individually and as Next
Friend of DOLORES CONLEY, DIANE CONLEY,
DONALD CONLEY and DUANE CONLEY, Minors,

Appellees,

v.

MICHAEL McNAMARA, PHILIP DOYLE, DANIEL
JOSEPH MINAHAN,

Defendants.

On Appeal of DANIEL MINAHAN,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

3341A.396

MR. PRESIDING JUSTICE LENE DELIVERED THE OPINION OF THE COURT.

By this appeal defendant Daniel Minahan seeks to vacate a default judgment entered against him for the sum of \$10,000, on the ground that he was not served with process as provided by Illinois Revised Statutes 1945, chapter 110, section 137, Article III, Section 13, Civil Practice Act.

On November 22, 1940, Alice Conley, administratrix of the estate of Charles Conley, deceased, individually and as next friend of her minor children, filed a complaint alleging that on June 17, 1940 her husband Charles Conley was shot by defendant Minahan in a tavern operated by defendant Philip Doyle, on premises owned by defendant Michael McNamara, and that Charles Conley died on June 18, 1940 as a result of the gunshot wound inflicted upon him by defendant Minahan.

On November 22, 1940 summons was issued. The sheriff's return appearing on the back of the writ reads as follows:

"I certify that I served the within writ on the defendant Daniel Minahan in the following manner, that is to say, by leaving a copy of the same at his usual place of abode in my county, with Catherine Marehof (step daughter) a person of his family of the age of ten years or upwards and

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informing such person of the contents thereof, on the 23rd day of Nov., 1940, and also by sending through the United States Post Office, on the 23rd day of November, 1940, a copy of the within writ in a sealed envelope, with postage fully prepaid, addressed to the said defendant at such usual place of abode, dated this 23rd day of November, 1940.

"Thomas J. O'Brien, Sheriff by Dan Borelli."

"Sheriff's Memorandum:

Sheriff's No. 306

Deputy--Borelli

Superior Court for

Deputy--Munn

11/23 Step-daughter

Process C. B. . . . Please serve

Name--Daniel Minahan

Address--518 W. 43rd Street

How served. . . .

Date served-- Catherine Marshof."

June 12, 1942 judgment was entered by default against defendant Minahan for failure to file an answer. Disposition of the cause as to the other defendants, Doyle and McNamara, does not appear from the record and it is not material.

January 13, 1947 defendant filed a written motion to vacate the judgment and for leave to answer the complaint. Afterwards at the hearing of defendant's motion before the trial court on January 27, 1947 he presented certain affidavits and testimony in support of his motion. On May 6, 1947 an order was entered denying defendant's motion to plead to the complaint nunc pro tunc as of February 28, 1947.

Section 13 of the Civil Practice Act provides: "Except as otherwise expressly provided herein, service by summons upon an individual defendant in any civil action shall be made (1) by

leaving a copy thereof with the defendant personally or (2) by leaving such copy at his usual place of abode with some person of the family of the age of ten years or upwards, and informing such person of the contents thereof,"

Statutes providing for substitute or constructive service are a departure from the common law and therefore will be strictly construed. (Boyland v. Boyland, 18 Ill. 551, White v. Primm, 36 Ill. 416; Wanamaker v. Poorbaugh, 91 Ill. App. 560; Kurilla v. Roth, 132 N. J. L. 213, 127 A. L. R. 1267, 42 Am. Jur. 49, Sec. 61.) An abode is universally defined as the place where a person dwells. (Pope v. Board of Election Comrs., 370 Ill. 196.)

It is undisputed that defendant owned the premises commonly known as 518 West 43rd Street in the City of Chicago and that they are improved with a two-story building which contains a store with living quarters in the rear and an apartment on the second floor in which the defendant's step-daughter Catherine Murtaugh (misspelled "Marchof" in the sheriff's return) lived at the time of service of process.

In his affidavit defendant avers that the first time he learned of the existence of this case and the judgment here involved was in the latter part of August, 1946, through his attorney who had obtained a preliminary report of title from the Chicago Title and Trust Company; that from August 30, 1940, until August 1941 his "usual place of abode" was the Lemont Apartments, 6335-37 South Kenwood Avenue, Chicago, and that he was in no way "responsible or caused or contributed to the death" of plaintiff's intestate.

An affidavit by Harry Wedel, owner and manager of the Lemont Apartments, stated that defendant Minahan resided as a tenant in his premises from October 30, 1940 until October 1941.

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An affidavit by Catherine Murtaugh, defendant's step-daughter, avers that her mother was married to the defendant and that he lived with "our family" in the second-floor apartment of the premises known as 518 West 43rd Street until shortly after the death of her mother December 27, 1933; that in January 1934 defendant moved to and maintained his usual place of abode in the rear apartment on the first floor of the premises; that during the middle of September 1940 defendant left the premises and thereafter lived elsewhere.

John P. Daley, an assistant attorney of the Board of Election Commissioners of the City of Chicago, testified in substance that the precinct registration card in their office concerning Daniel Minahan disclosed that in the original registration on September 19, 1936 Minahan registered from 518 West 43rd Street and that he voted from that address in the general election of 1936, the primary and general election of 1938, the primary and general election of 1939, and the primary election in 1940; that defendant did not vote in the general election of November 1940; and that he voted in the general election of 1946, giving his address as 3156 East 80th Street.

In support of defendant's motion he filed two affidavits of William J. Lynch. In the first affidavit Lynch stated that defendant resided at 518 West 43rd Street between October 17, 1940 to October 1941. In the second affidavit Lynch stated that he had known the defendant more than twenty years and that defendant, his wife and step-children lived together in the second-floor apartment at 518 West 43rd Street; that shortly after the death of his wife, Ellen Minahan, defendant moved into the rooms in the rear on the first floor of the premises, and that in the fall of 1940 defendant left the premises, and that affiant Lynch had never seen him there since. Lynch also averred that he made the first affidavit "to a

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man who showed me a voters' registration list with Daniel Minahan's name on it. . . . I assumed that the list was correct."

The uncontroverted evidence shows that Catherine Murtaugh at the time of service was not "some person of the family" within the plain language of section 13 of the Civil Practice Act. She lived in the apartment on the second floor, and defendant's "usual place of abode" since January 1934 and until he left the premises at 518 West 43rd Street in September 1941 had been on the first floor. According to the affidavit of Catherine Murtaugh she maintained "separate and distinct" living quarters on the second floor at the time of service. Therefore, even if defendant had been actually living on the first floor at that time, attempted service upon her in these circumstances would be a nullity. (Kline v. Kline, 104 Ill. App. 274.) To the same effect is Berryhill v. Sepp, 106 Minn. 458, 119 N. W. 404.

Absolute verity is not imported by the sheriff's return but is only prima facie evidence of the truth of the matters therein stated. (Kulikowski v. North American Mfg. Co., 322 Ill. App. 202.)

We think the evidence clearly shows that defendant has not been served as required by law and the court had not acquired jurisdiction when the judgment here complained of was entered. (Sweet v. Sweet, 277 Ill. App. 545.) The defendant should have his day in court by being permitted to defend the case on its merits.

For the reasons assigned, the order of May 6, 1947 is reversed and the cause is remanded with directions to proceed in a manner not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KILEY AND BURKE, JJ. CONCUR.

43827

CHICAGO TITLE AND TRUST COMPANY,
a corporation,

Plaintiff,

v.

WILLIAM J. CLEARY,

Defendant.

WILLIAM J. CLEARY,

Counter-claimant (Appellee),

v.

CHICAGO TITLE AND TRUST COMPANY,
a corporation,

Counter-defendant (Appellant).

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

33414-337

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is the third appeal in this case which began May 12, 1932 with a suit on an open account of \$481.80 for escrow and trust fees and developed into several lengthy trials on a counter claim for \$225,000 damages for breach of an alleged escrow agreement. The first appeal was from a judgment for the Trust Company, counter-defendant, notwithstanding a verdict for Cleary, counter-claimant, in the amount of \$150,844.50. Cleary appealed and this court reversed the judgment and remanded the cause for a trial on the merits. (286 Ill. App. 97.) The subsequent trial resulted in a verdict and judgment for Cleary in the amount of \$110,000. The Trust Company appealed. This court reversed that judgment and remanded the cause for a new trial (319 Ill. App. 83.) The succeeding trial resulted in a verdict and judgment for Cleary for \$209,000. From that judgment the Trust Company has appealed.

The Trust Company took a nonsuit in its action. Cleary's sixth amended counter claim as amended is based upon the breach of an alleged escrow agreement of November 26, 1927 between the Trust Company, Cleary, G. Frank Croissant, Robert E. Owens and Chicago Harbor Lumber Company, by Fred T. Becks and C. A. Knittel. The Trust Company replied denying that an escrow agreement was made on that date. It has never disputed the escrow between the parties named on November 21, 1927, or another between these parties, excepting Cleary, on November 11, 1927. The admitted escrows involved transfers of real estate from Croissant and Owens to Cleary and from him to the Harbor Company. The plan was to enable the Harbor Company to perform its obligation under a trust deed of October 15, 1927, to transfer the real estate to the Trust Company, as trustee, to secure \$200,000 Harbor Company bonds. The only substantial differences in the terms of the disputed escrow from those in the November 21, escrow are provisions for payment to Cleary of \$100,000 Harbor Company bonds, \$10,000 cash "and stock." This is the consideration provided for Cleary in an "Agreement for Sale of Realty," September 30, 1927, between him and the Harbor Company, by Becks and Knittel, to purchase property from Cleary. In that instrument the provision is for 51% of the stock of the Harbor Company. The Trust Company refers to that instrument as a "front" for the contemplated bond issue. In his counter claim Cleary seeks damages measured by the value of the bonds and cash. The verdict of \$209,000, we infer, included interest.

The trial court denied the Trust Company's motion for judgment notwithstanding the verdict and for a new trial. The court said, in a written opinion, that had the case been tried

without a jury, it would have found for the Trust Company and against Cleary. It referred to the three verdicts for Cleary and said that in view of the fact that 36 jurors had believed the testimony of Cleary's witnesses, it could not substitute its evaluation of the witnesses' credibility for that of the jurors.

Knittel and Guy Powell in 1926 and 1927 were lawyers having offices in the same suite. Becks was a client of Powell whom Knittel met about 1923. These three formed the Calumet Lansing Lumber Company in 1926. On August 8, 1927, the Chicago Harbor Lumber Company was incorporated and took over the assets and the liabilities of the Calumet Lansing Company. Powell, Becks and Knittel held the stock of both corporations. There were 1,000 shares of Harbor Company stock issued. Becks was made president of the Harbor Company and Knittel secretary-treasurer. At that time Knittel had known Cleary for more than 12 years. Cleary has been a court reporter for 40 years. He had done work for Knittel.

The "Agreement for Sale of Realty" of September 30, 1927 is in evidence. By its terms Cleary agrees to sell real estate in consideration of the Harbor Company paying him \$100,000 of Harbor Company bonds within thirty days, 51 per cent Harbor Company stock fifteen days thereafter, and \$10,000 cash within one year thereafter. This, on the basis of a stated appraisal of \$135,000. The agreement contains no legal description of the property, subject of the agreement. It recites, " * * * the following described real estate (description hereto attached) * * *." The description is not attached to the document in evidence. It is Cleary's contention that there was attached a printed legal description cut out of a copy of the trust deed later executed. It appears that the properties subject of the agreement, were those described in the Trust Deed as sites 2, 3, 5, and 6.

Sites 2 and 5 were subject of a deed from Croissant to Cleary dated October 13, 1927; site 3, subject of a deed from Owens to Cleary, October 13, 1927; and site 6 subject of 4 contracts of purchase dated August 15, 1927 between the Union Bank of Chicago, Trustee, as seller and Cleary's daughter Isabelle. Cleary's attorney in oral argument here stated that when that instrument was signed, verbal negotiations were in progress for the acquisition by Cleary of the property from Croissant and Owens. The deeds from Croissant and Owens and a deed by Cleary of the Site 6 property were deposited with the Trust Company in Escrow 70521. This escrow was created by the agreement of November 11, 1927. That agreement was cancelled by the subsequent agreement of November 21st, covering the same numbered escrow. The provisions of the two are substantially the same. There were also deposited in the escrow deeds from Cleary to the Harbor Company of the property conveyed to him by Croissant and Owens. Under the terms of the escrow Croissant was to receive from the Harbor Company \$14,616.67 for the deeds from him and Owens. According to the four real estate contracts, Cleary had paid but one-half of the stated purchase price of about \$82,000.

There was also deposited in the escrow under the agreement of November 11th a deed from one Lorenz to the Harbor Company covering site 1. The escrow provided Lorenz was to receive \$12,000 worth of bonds when deposited. Lorenz objected to taking bonds for his interest and, accordingly, separate escrows were made with him on November 16th and 23rd. Under these he was to receive cash instead of bonds.

The several sites were conveyed by the Harbor Company to the Trust Company, as trustee, in the trust deed of October 15, 1927, as security for \$200,000 in Harbor Company bonds. Additional security provided in the trust deed was the personal guarantee of Becks and a pledge of two-thirds of the Harbor Company stock.

1/2 The above information was obtained from the

records of the Department of the Interior, Bureau of

Reclamation, and is being furnished to you for your

information. It is requested that you keep this

information confidential and not disclose it to any

other person. The information is being furnished to you

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November 3, 1927, 667 shares were deposited with the Trust Company, as trustee, according to a receipt executed by the Trust Company to the Harbor Company for certificates numbered 2, 3, 6, 7, 8, 9, 11 and 12.

By the terms of the trust deed the Trust Company was obligated to authenticate and deliver the bonds on the written order of the Harbor Company by its president and secretary. November 25, 1927, the order was given by Becks and Knittel to the Trust Company's trust department to authenticate and deliver the bonds to the escrow department, for escrow 70521. November 29th Becks and Knittel directed the Trust Company in writing to deliver \$125,000 of the bonds out of the escrow to Kirkeby, Watts & Company, hereinafter called the Bond Company; to hold \$30,000 of the balance subject to the approval of the Bond Company; and to pay \$42,000 of the balance on "land contract." The delivery was made and bonds were received by the Bond Company November 30th. The same day the Bond Company issued its check for \$12,393.93 to the Trust Company. It in turn paid that sum into the Lorenz escrow for the acquisition of Site 1.

Despite the deposits of the deeds by Cleary, neither of the undisputed escrows of November 11th and November 21st made provision for payment to him. He was not a party to the first, but he was to the second. His case rests on his claim that before signing the escrow of November 21st he had not read it thoroughly; that he subsequently reread it and saw that by its terms he was to deposit a deed to a Site 4, property which he did not own, and that no provision was made for payment to him of the cash, stock and bonds provided in the September 30th "Agreement for Sale of Realty", and no limitation placed upon his obligation to pay the

[illegible]

By the terms of the contract, the Government was obligated to furnish the contractor with the necessary facilities for the construction of the project. The contractor was to be responsible for the design, construction, and maintenance of the project. The Government was to provide the necessary land and other facilities. The contractor was to be paid a fixed fee for the construction of the project. The Government was to provide the necessary land and other facilities. The contractor was to be paid a fixed fee for the construction of the project. The Government was to provide the necessary land and other facilities. The contractor was to be paid a fixed fee for the construction of the project.

expenses of the Trust Company in connection with the escrow; that he complained to the Trust Company; and that a third escrow agreement was made between the parties on November 26, 1927. The existence of this alleged third escrow is the vital issue in the case. Cleary introduced in evidence at each trial an alleged carbon copy of the disputed agreement. It consists of three pages. The provisions for Cleary are on page 2.

In our previous opinion (319 Ill. App. 83) we said that the jury had before it conflicting theories on Cleary's behalf. One was that pages 1 and 3 of the disputed escrow were carbon copies of pages 1 and 3 of the November 21st escrow. The other theory was that they were not carbon copies. We found that pages 1 and 3 were carbon copies of the November 21st escrow. In the record of that trial testimony for Cleary was that an original and copy of the November 26th escrow agreement were delivered to him unsigned. The original November 21st escrow was in the record intact and signed. It was impossible, therefore, that the original pages 1 and 3 of the November 21st escrow could have been used to make an original of Cleary's alleged copy of a November 26th escrow. We said that Cleary should have an opportunity to present evidence to sustain the remaining theory, which he adopted in this court, that is, that pages 1 and 3 of the alleged November 26th escrow were carbon copies of pages 1 and 3 of the November 21st escrow. We reversed the judgment and remanded the cause with directions to submit it to the jury upon that theory. This shows that the issues in the instant and previous trial were not the same. The contention as to successive verdicts has no merit.

Under the issues made by the pleadings, Cleary had the burden of proving the alleged escrow agreement of November 26th and its acceptance by the Trust Company; performance of the prerequisites to the Trust Company's obligation under the escrow, or conduct of the Trust Company waiving this performance; non-performance by the escrowee of its obligation; and damages. The Trust Company had the burden of proving its defense that Cleary ratified the delivery of the bonds to the Bond Company. This delivery is the basis for a claim by Cleary of an anticipatory breach waiving his performance under the alleged escrow.

The delivery of the \$125,000 bonds by the Trust Company to the Bond Company, pursuant to direction of Becks and Knittel, made impossible the performance of the Trust Company's obligations to Cleary under the alleged escrow agreement. If he ratified the delivery, therefore, his case should fall since he thereby abandoned the basis of his case. We shall, therefore, consider this phase of the case first. The verdict indicates that the jury found that the Trust Company failed to prove by a preponderance of the evidence that Cleary ratified the delivery of the bonds.

The Bond Company had prepared preliminary and final drafts of a circular advertising the sale of the bonds. The Trust Company contends that Cleary not only participated in the preparation of the trust deed of October 15, underlying the bond issue, but in the drafting of the circulars as well. Attorney Lodwick, who then represented the Bond Company, testified that Cleary read the galley proof of the trust deed; participated in conferences and made suggestions with respect to the contents of the circulars; and approved the final draft. This witness said he advised Cleary at the time against a provision in the preliminary circular for a personal guarantee by Cleary. This provision was eliminated from

the revised final draft. Witness Coombs, then in the investment business, testified for the Trust Company that he was solicited by Langley of the Bond Company and Cleary to aid in selling the bonds; that they brought to his office a copy of the bond circular; that he worked with Cleary, Becks and Langley on the Harbor Company financing early in the Summer of 1927; that they had several meetings and that Langley and Cleary seem to be the moving spirits. Five hundred circulars were printed carrying the name of this witness and were delivered to his office. He did not testify at the previous trials.

Knittel testified as Cleary's witness that most of the conferences in connection with the bond issue were between Becks, Cleary and Langley; that the bond issue was decided upon before the incorporation of the Harbor Company; that he must have discussed the bond issue with Cleary and Becks during the summer of 1927; that Becks and Cleary had discussed the issue with the Bond Company before the September 30th contract was made; that Becks and Cleary were constantly figuring out ways and means of handling the situation; that Cleary introduced him to Messrs. Watts and Langley of the Bond Company; that the issue was probably discussed about that time and approval of the property was made for the Bond Company; that he thinks he met Cleary in Watt's office several times and that the prospectus was discussed but he does not remember whether Cleary was present; that he thinks he saw the bond circular at Watt's office but did not know whether Cleary was present; that he presumed that Becks and Watts worked out the bond circular; that it sounded like Becks' language; that he did not know whether Cleary participated but that he saw Cleary and Becks at Watts'; that he was concerned about the need of operating capital through the summer of 1927; that the purpose of Cleary, Becks and himself was to use the bond issue to get operating capital; that Becks and Cleary

were dickering around with the Bond Company for months and he did not remember talking with Cleary about the circular but did not avoid Cleary at the Bond Company's office; and that it was always his understanding Cleary, Becks and himself were in the deal together, vitally interested in what was to be done with the bonds.

Cleary testified that A. R. Marriott, then Vice President of the Trust Company, sent him to the Bond Company before September 30, 1927; that the Bond Company asked Cleary for an appraisal of the underlying property; that he had the appraisal made and sent to the Bond Company; that he had nothing to do with preparing the bond circular; that he knew Knittel and Powell for 20 years before he started negotiating with Becks and Knittel in the Spring of 1927; that he introduced Beck and Knittel to the officers of the Bond Company; that he had his first talk with Watts in July of 1927 and was at the Bond Company office several times; that he first discussed the issue with Knittel and Becks in the summer of 1927; that the first conversation preceded the appraisal; that the amount of the bond issue was decided before the making of the September 30th contract; that he first saw the bond circular at one of the earlier trials and did not remember seeing it on any visit to the Bond Company; that he did not remember being in the Bond Company's office witnessing the preparation of the copy of the circular; that he did not remember meeting Lodwick and the latter's superior before and during October with reference to the circular; that he talked with Lodwick, but not about the circular, only about the bonds; that he knew on October 7th that the Bond Company was to have the bonds printed; that he does not remember conferring with Lodwick on the trust deed; that he conferred with him once in the presence of

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Langley about a personal guaranty; and that he gave Langley no suggestions about the form or language of the trust deed or the circulars. Cleary admits paying the bill for the printing of the circulars.

The preliminary circular provides for a \$200,000 issue and lists as security the sites described in the trust deed, giving their value at \$298,200; states that the purpose of the issue is the consolidation of the Calumet Lansing Lumber Company's real estate holdings with those of Cleary and Becks, in the Harbor Company; provides for the distribution of the proceeds of \$100,000 of bonds to apply on the acquisition of "land in fee", \$75,000 to be used to refund mortgages, the balance for construction and working capital; and provides that additional money for land is to be raised by the issuance of \$100,000 common stock. It provides that Becks and Cleary, "regarded as substantial Chicago businessmen" whose combined net worth exceeded \$500,000 would personally guarantee the bonds. Knittel, "a member of an old and well-known Chicago family enjoying an excellent reputation," is listed as an officer. The revised circular provides for a bond issue of \$125,000 lists the same sites and states that \$75,000 of bonds not subject of the issue, are in escrow with the Trust Company, \$30,000 for additional property and \$45,000 to refund purchase contracts amounting to \$42,000 covering Site 6, the property deeded by Cleary. It will be noted that in the revised circular, provision for using \$100,000 bonds to buy real estate was omitted.

The agreement to purchase the Lorenz site was made by Becks and Knittel in December 1926 and \$3,000 was paid on the \$15,000 purchase price. Ten Thousand Dollars were expended thereon beginning in March 1927. In the November 11th escrow provision was made to pay Lorenz \$12,000 in bonds. Cleary says

10/1/54

Dear Mr. [Name] [Address] [City] [State] [Zip]

I am writing to you regarding the [Topic] [Details]

[Additional details and information]

[Further details and information]

[Continuation of the letter]

[Continuation of the letter]

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Sincerely,
[Signature]
[Name]
[Title]
[Company]
[Address]
[City]
[State]
[Zip]

he did not see this provision when he read the escrow agreement. Subsequently, Lorenz refused to take bonds. A revised agreement then became necessary. The November 21st escrow was signed by Cleary. He says he signed it without reading. The Lorenz bond provision was excluded from it. The Harbor Company was in financial distress. Site 1 was essential and cash instead of bonds was required to obtain it.

Attorney Nordhold testified that Cleary advised him before he met Lorenz that the latter was to be his client; that thereafter he represented Lorenz in connection with the November 16th Lorenz Escrow; and that when Lorenz refused to take bonds Cleary told Nordhold the conveyance from Lorenz would have to be made so that money could be obtained on the bonds for Lorenz. Wienke and Tansley of the Trust Company corroborated this witness as to Cleary's statement that the bonds could not be certified unless Lorenz' deed was deposited. Wienke said that he was present with Nordhold, Knittel, Becks and Cleary on November 23rd when the second Lorenz escrow was made; that Cleary said the cash for Lorenz would come from the sale of bonds through La Salle Street brokers; that thereafter Cleary called him, saying, "I have got to have those bonds certified"; that Cleary, Tansley and he discussed the certification; and that the order from Becks and Knittel to certify followed. The discussions between Cleary and Nordhold are said to have been on November 23rd, two days before the order to certify the bonds. To connect Cleary with the order the Trust Company points to Nordhold's and Wienke's testimony with reference to Cleary's anxiety that the La Salle Street brokers sell the bonds.

On November 25, the day of the order, Knittel and Cleary applied to the Trust Company for a guaranty policy covering sites

1, 2, 3, and 5. November 28th, Wienke wrote Becks that the bonds were certified and would be delivered to the Bond Company upon receipt of \$12,500. This letter was written to Becks, in care of Cleary's office. Becks officed in Cleary's suite next to Cleary's office. Both were served by a common reception room. Cleary said his secretary gave the letter to him. He said he tried to call Becks, but could not reach him and then called Powell. He did not call Knittel. He does not remember discussing this letter with Becks, nor whether he gave it to him. The Trust Company says it must have reached Becks since he acted upon the letter.

Cleary says that after he called Powell, the latter on November 28th dictated a notice to the Trust Company and Cleary had it typed; that they then went to the Trust Company and served Tansley instead of Marriott, Vice President, because they had bothered the latter too much, and he was not in; that Tansley was very busy and he had his secretary sign and acknowledge service of the notice; and that attached to the notice was a copy of the "Agreement for Sale of Realty" of September 30th. The acknowledgment is signed, "Chicago Title and Trust Company, H. J. Tansley, Secy." It is interesting to note, as the Trust Company points out, that the notice is dated but two days after the alleged escrow of November 26th, yet Cleary and Powell in the notice relied not upon the escrow but upon the September 30th instrument to which the Trust Company was not a party. The notice calls upon the Trust Company not to deliver the bonds in its possession until Cleary has been paid what is due him under the instrument of September 30th.

In the delivery order of November 29th Becks and Knittel ordered the Trust Company to retain \$75,000 bonds in the escrow for the purposes stated in the Bond Company's circular and in

an agreement made November 29, 1927 between the Harbor Company, by Becks and Knittel and the Bond Company. This agreement provided for the delivery of the bonds and a \$12,500 note of the Harbor Company and the issuance by the Bond Company of the check for the Lorenz escrow.

The bonds were received by the Bond Company November 30th and none were ever returned to the Trust Company. The same day the Bond Company wrote a check for the money due Lorenz. This check was received by the Trust Company on the same day and the proceeds thereafter paid to Lorenz. Wienke says he checked the escrow file before delivering the bonds and found no reason not to deliver, having found no document making provision for Cleary; that shortly after delivering the bonds he met Cleary who advised him of the notice to the Trust Company not to deliver the bonds; that when asked by Wienke why he served the notice, though the bonds were delivered, Cleary said it would work out all right, and that subsequently Cleary said he was interested in the escrow though no provision was made for him because he had a separate deal. Cleary admits that he and Powell met Wienke after they served the notice but could not remember that Wienke passed any remark.

Knittel testified that early in the transaction he met with Cleary and Becks one or two evenings for discussions and Cleary looked over the books of the Company; that Becks and Cleary wanted to enlarge the corporation from local to national; that Cleary insisted on having a controlling interest in the Company, and Knittel did not like the idea; that continuously through the whole period there was a departure from the September 30th instrument; that the bond issue was under discussion for a long time before the existence of that instrument; that when he signed

The first part of the report deals with the general situation of the country and the progress of the work during the year. It is followed by a detailed account of the various projects and the results achieved. The report concludes with a summary of the work done and the plans for the future.

The work has been carried out in accordance with the programme of work approved by the Council of the League of Nations. The main objects of the work have been to collect and publish information on the various aspects of the life of the people of the country, and to study the causes of the various social and economic problems which are afflicting the country.

The work has been carried out in a systematic and methodical manner, and the results have been published in a series of reports. The first report, which was published in 1921, dealt with the general situation of the country and the progress of the work during the year. The second report, which was published in 1922, dealt with the various projects and the results achieved. The third report, which was published in 1923, dealt with the various projects and the results achieved. The fourth report, which was published in 1924, dealt with the various projects and the results achieved. The fifth report, which was published in 1925, dealt with the various projects and the results achieved. The sixth report, which was published in 1926, dealt with the various projects and the results achieved. The seventh report, which was published in 1927, dealt with the various projects and the results achieved. The eighth report, which was published in 1928, dealt with the various projects and the results achieved. The ninth report, which was published in 1929, dealt with the various projects and the results achieved. The tenth report, which was published in 1930, dealt with the various projects and the results achieved.

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the order for delivery of the bonds he ignored the September 30th instrument and had to ignore others; and that when the Harbor Company bonds were delivered to the Bond Company it was impossible physically to deliver the bonds to Cleary in accordance with the instrument of September 30th or the disputed escrow.

Knittel further testified that he did not know whether Cleary knew what was going on with reference to the withdrawal of the bonds from the escrow, and did not care; that his understanding was that Becks and Cleary should have known what was going on; that he testified at the previous trial that he "imagined Cleary knew it"; that "he should have known it if he didn't. He should have known it because to my mind it was so common knowledge of everybody in the deal"; that this referred to the impossibility of giving Cleary 51 per cent of the stock under the September 30th contract, and the deal referred to Cleary, Becks and Knittel; that the bonds delivered to the Bond Company included those that would go to Cleary; that he did not refrain from talking about the delivery of the bonds when he saw Cleary; that there was no agreement between him and Becks not to tell Cleary about the delivery; that he was in Cleary's office November 28th, but does not remember talking to Cleary about certification of the bonds three days before; that he doesn't think he talked to Cleary about the order to deliver though it is possible he did when he was with Cleary the day the order was given; that he did not think anything he did in connection with the bonds was a secret as far as Becks and Cleary were concerned; that he assumed that Cleary knew what was going on; that he assumed that delivery of the bonds to the Bond Company was agreeable to Cleary; that during those days he saw Cleary and he imagined he talked to him from time to time during December and had no reason not to tell him of the bond delivery; that Cleary should have a complete file of everything that transpired, including copies of the letters to the Trust Company regarding authentication

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and delivery of the bonds; that he believes Cleary has copies; and that with reference to the bonds, Becks and Knittel followed "religiously" the bond circular. It will be noted that the order by Becks and Knittel to deliver the bonds to the Bond Company followed the provisions of the circular with respect to the \$75,000 bonds left in the escrow.

Knittel also testified that he was interested in getting money into the Company and did not like giving Cleary control; and that when he ordered delivery of the bonds he "figured" Cleary, Becks and Watts had worked out a separate deal; that he never said he did what he did without Cleary's knowledge; that he assumed that Cleary and Becks were constantly together and when Watts and Becks called him and they met to pick up the bonds, he assumed that it was O.K. with Cleary; that he was asked no questions; and that he always assumed Cleary knew what he had done, because Cleary and Becks were close together, "galavanting around the Loop, trying a lot of high financiering," while Knittel tried to salvage the Company.

July 29, 1927, Cleary joined Becks in the execution of a ninety-day note for \$7,000 to the State Bank of Chicago. This was followed December 31, 1927 by a note for a like amount to Cleary from the Harbor Company by Knittel and Becks. This latter note was secured by \$12,000 worth of Harbor Company bonds. Receipt of these bonds according to Cleary was his first knowledge of the delivery of the bonds out of the escrow. Memoranda were introduced in evidence which indicated that Knittel and Cleary on December 14th sought to borrow from the Continental Bank \$40,000 against the Harbor Company bonds. Cleary did not dispute the memoranda.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the results of its investigation into the alleged activities of the British Intelligence Service in the United States.

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October 7, 1927, Cleary wrote Becks that, according to their agreement, Cleary would turn over to the Harbor Company \$100,000 in bonds and Becks would turn over to Cleary one-half of the Harbor Company stock. This letter was not in evidence at the preceding trial. The letter concluded with a request that Becks inform the Bond Company to consider the letter its authority to deliver the bonds to the proper officer of the Harbor Company. Cleary says he signed the letter without reading it, while in a hurry to get to court, and found the copy on his return from court and was "astonished." He says he then wrote Becks and the Bond Company a letter to repudiate the letter to Becks. The letter to Becks was sent to the First National Bank Building office of Powell and Knittel. Cleary was confronted with the October 7th letter to Becks for the first time on cross-examination. He then said that the letter may have been dictated by him or Becks. He promised to supply "a document" which would clear up the October 7th letter. A couple of weeks later, on rebuttal, he produced a copy of a letter from him to Becks. This referred to the previous one as the one "you had me sign without reading." Cleary insisted, on rebuttal, that he did not dictate the previous letter. At a lower left-hand corner of a copy of the October 7th letter, typewritten, is the word "Accepted" and the initials, W. J. C./M.

Cleary further testified that the delivery of the bonds to the Bond Company was not part of a plan between Knittel, Becks and him to obtain the money for the Lorenz deal; that he did not know of the provision for the Lorenz cash; that he did not know until December 31, 1927 that the Lorenz site was not owned by the Harbor Company; that he never inquired of Knittel the purpose of authenticating the bonds and delivering them to the escrow, nor into the requirement, before release of the bonds, that the Lorenz

money be paid to the Trust Company; that he never talked to Knittel about the delivery order; that he was not present when the Lorenz escrow was prepared and that he never told Nordhold that Lorenz was to be his client, nor that the Harbor Company needed money, nor that it had to get money for Lorenz through the bonds, nor that Lorenz should join in the escrow; that he did not tell Nordhold that the brokers on La Salle Street were raising "oane"; that he did not tell Wienke he had a side deal; that he did not know whether the Harbor Company was in distress after its organization; that he did not know that the Company could not pay its bills; that he did not know on November 28th that the Harbor Company did not have means to pay Lorenz or to make the deposits of cash for Croissant and him; that Knittel did not tell him during December about the bonds; and that he does not know why the November 26th escrow was not referred to in the November 28th notice to Tansley.

He further testified that none of the considerations provided in the September 30th instrument passed to him according to the terms; that he did not demand the stock and that it was not delivered and that he declared no forfeiture, as was his right; that he was to receive \$185,000 under that contract; that he accepted the stock to give the Company a "break"; that he was to hold the stock until he received the bonds and thereafter make arrangements for the balance; that he thought the arrangement was more talk than anything else; that he intended holding the stock until his property was paid for; that he was interested in the Company's plans because the owner of a controlling interest wants the corporation to "prosper"; and that he knew of the requirements of the trust deed as to the stock.

Cleary says he had not talked to Knittel or Becks about the order to deliver the bonds. The Trust Company says that if

the alleged escrow was in the files at the time of delivery, Wienke deliberately violated the escrow, not only without prospect of gain, but only with prospect of trouble. The bonds were delivered and the Lorenz check issued, the bond circulars were delivered and December 7th the first bond was sold. In two weeks only \$2,200 worth of bonds were sold. Cleary says that he made demand for the bonds, cash and stock, first in the November 28th notice to Tansley and also verbally to the Trust Company through Miss Kohn and Weinke after January 1, 1928. Those to whom he says he addressed the demands deny that he made them. He says that in the company of a lawyer each time, he examined the November 26th escrow at the Title Company on five occasions. Attorney Harvey testified that he compared Cleary's copy of the disputed escrow with the Trust Company's at its offices in July 1928; that he and Cleary were informed that no reason could be seen why the escrow should not be closed in a week; that he attended the two trials preceding the instant trial and general references to the escrow refreshed his memory; and that he "volunteered" his remembrance to Cleary after the trial next before the instant one. It will be noted that this witness said nothing about a complaint for breach of the escrow. He says his visit was to check on progress. Cleary says he knew in December 1927 that the bonds were delivered out of the escrow. He accepted a pledge of bonds for a personal loan and sought to pledge others for a loan to the Harbor Company. Yet in the following year, according to him and Harvey, the expectation was that the escrow would be completed.

Cleary in a letter of May 3, 1928 to the Trust Company refers to the \$75,000 of Harbor Company bonds in the possession of the Trust Company and says, "I hope we will both get the amount due us in the very near future." March 31st he writes that there

is considerable money due him, apparently from the Harbor Company, which he hoped to collect. February 25, 1932, he wrote Croissant asking his assistance in extricating the property in view of the proposed Chicago Harbor development. This was written almost five years after the alleged escrow and breach, yet not a word of complaint or criticism. Cleary had hope of finally rescuing the project.

We have shown that Knittel, Cleary's own witness, gives corroboration to the Trust Company witnesses in proof of its affirmative defense. An intimation arises from his testimony that he and Becks perpetuated a fraudulent scheme upon Cleary and that he and Cleary were not friendly after the Harbor Company plans were frustrated. They met each other after December 1927 and in 1931, Cleary recommended Knittel to a client as a good draftsman for a will and Knittel drew the will. Moreover, Cleary and his family corresponded and visited with the Becks family for years after the failure of the Harbor Company project. This conduct is hardly consistent with the theory that Becks was a party to a fraud which cost Cleary so much. Knittel says Cleary never mentioned suing until the Trust Company began its suit in 1932.

The Trust Company made its prima facie case of ratification. Cleary had the burden of going forward to overcome that proof. We believe the testimony, taken as uncontroverted, for Cleary on this issue, viewed against the testimony of ratification, would leave but one inference to be drawn by reasonable men, that is that he knew of and ratified the delivery. I. C. R. R. Co. v. Siler, 229 Ill. 390. Courts are not required to believe an unreasonable story, even though it is not contradicted, merely because it has been sworn to by witnesses on the trial of a case. Temper v. Campo, 398 Ill. 496; 76 N. E. (2) 490. Is it reasonable

to say that a man of Cleary's experience could remain ignorant of the plan to deliver and sell \$125,000 of bonds while he participated for months in laying the basis for the bond issue, introduced his coadventurers to the officials of the bond house, caused an appraisal of the underlying properties to be made at the request of the Bond House, received advice against serving as a personal guarantor under a provision of a preliminary Bond circular and paid the bill for the bond circulars covering the sale of \$125,000 of bonds? Can reasonable men believe he could be in as close touch with the matter, and his coadventurers, as the evidence discloses, and remain ignorant of the orders to certify and deliver the bonds to the Bond House? Only on the presumption that the Bond Company and Becks and Knittel purposely sought to keep and succeed in keeping him in the dark. Can that presumption stand in the light of Cleary's continued friendship for the presumptive conspirators?

We think that an inference that Cleary had no knowledge of the bond delivery violates all rational standards of what reasonable men in like circumstances would have known. Kelly v. Chicago City Railroad Company, 283 Ill. 640. We believe the facts and testimony hereinbefore set forth can leave no doubt that the jury was clearly wrong in finding against the Trust Company on its affirmative defense. It is our view that the jury closed their eyes to the facts and experiences of life when they arrived at a different conclusion. We believe that upon the evidence on this issue, reasonable men would come to no other conclusion than that Cleary must have known of and approved the delivery of the bonds even if he did not know precisely when delivery was to be made. We believe, therefore, that the trial court should have taken the case from the jury. Anderson v. Cummings, 325 Ill. App. 519; and Trego v. Rubovitz, 178 Ill. App. 127.

We hold as a matter of law that Cleary knew of the delivery of the \$125,000 in Harbor Company bonds out of the escrow of November 1927 and that by his conduct he ratified the delivery.

The judgment of the Municipal Court is, therefore, reversed.

REVERSED.

BURKE, J. CONCURS.

LEWE, P.J. SPECIALLY CONCURS.

I am in agreement with the main opinion. There is another aspect of the case, not covered in the opinion which I believe deserves consideration. O. A. Knittel was a principal witness for Cleary in offering proof of performance under the disputed escrow. I think Knittel's testimony is incredible.

Knittel testified that during the month of December, 1927 he paid Harriott the Trust Company's vice president \$24,616.67. This sum was to cover payments of \$10,000 to Cleary and the balance to Croissant under the alleged escrow agreement of November 26, 1927. According to Knittel, in March, 1927 he misappropriated a mortgage for \$20,000 in which he was named as trustee; he pledged this mortgage as collateral for his personal note to secure a loan of \$20,000; he also misappropriated to his own use interest which was paid to him on the mortgage in excess of \$1,000. The evidence shows that during the month of December 1927 he was threatened with criminal prosecution because of his wrongful conduct; his automobile had been taken from him; he was ordered out of his law office for failure to pay rent; he was threatened with the loss of his household furnishings; and feared eviction of his family from their home. On December 13, 1927 his bank account was overdrawn in the amount of \$1,670, and on December 19 his check for \$3,500 was protested. He admitted that some of his checks were "bouncing" at that time. There

can be no doubt that in the month of December 1927 Knittel was in desperate financial straits.

Knittel says he made all of the payments to the Trust Company out of his money borrowed by him on several notes; that he was given receipts for various installment payments made to Harriott; that each receipt was written with pencil on scratch paper and destroyed or sent to Cleary or Becks within twenty-four hours; that he could not recall whether the payments were made in three or four or twelve installments but that the final payment of \$4,000 was made December 30, 1927 and at that time he received a full receipt for the cash and stock which he had deposited; that neither the interim nor the final receipts were signed by Harriott personally; and that an attendant signed Harriott's initials under the latter's directions. According to Knittel, the final payment and the preceding payment of \$2,000 represented the proceeds of loans made by him from Kirkeby, Watts & Co., and he could not recall whether the other installments were met by checks, cash, or in what amounts, but that the final payment was cash; and that these deposits were made to complete the escrow of November 26, 1927.

The record of Knittel's bank account for December 1927 is in evidence. The balance at the beginning of the month was \$23.55 and on the last day of the month \$977.75. Deposits made during the month were: \$4,972.50 on December 2; \$375 on December 9; \$2,000 on December 13; \$4,000 on December 19; \$230 on December 23; \$30 on December 28; and \$1,005.27 on December 29. The record further shows a note from the Harbor Company, by Becks and Knittel to Kirkeby, Watts & Co. on December 12th for \$2,000 and another from Knittel to Watts made December 27 for \$4,000. Knittel's

account was overdrawn \$1,670 on December 13, and the same day \$2,000 was deposited. December 19 he was overdrawn \$3,320 and the same day \$4,000 was deposited. It seems plain that the \$2,000, proceeds of the note, was used to cover the overdraft on December 13, and the \$4,000 December 27 needed to cover the \$4,000 deposit which was made December 19. This overdraft appears to have been caused by the issuance of a check from Knittel to the Harbor Company for \$3,500. The record does not disclose where the deposits of December 2 and December 19 came from. The Trust Company points out that setting aside the alleged final payment of \$4,000, Knittel says he deposited in the escrow more than \$20,500 during the month of December. It argues that if this sum were deposited in three installments this would mean about \$7,000 each; if four installments of about \$5,000 each; and if twelve about \$1,800 each. Knittel said it was "only an opinion" of his that he deposited the proceeds of the two notes mentioned above with the Trust Company. Neither the Calumet Lansing nor the Harbor Lumber Company was in a position to advance money to Knittel for that purpose. The Harbor Company's checks were "bouncing" and the only money it had was the money Knittel put into it from day to day. The money Knittel obtained through the breach of his trust in connection with the mortgage was borrowed the preceding March. It is highly improbable that these moneys could have aided appreciably in escrow deposits nine months later.

Knittel says his alleged deposits constituted a debt of the Harbor Company to him. He filed a debtor's schedule in 1928 and 1929 in the Municipal Court of Chicago in which he did not list that debt, and stated in his schedule that he had no debts which were collectible. This debt properly fell in that class.

A receiver for the Harbor Company was appointed August 1928. Knittel filed a claim with the receiver and listed cash advancements ranging from \$4.96 to \$300. The alleged escrow deposits are not included in the list. According to Knittel, his personal records, including check stubs, account books, etc., were destroyed by him in November 1930 for the reason that he wanted to "start clean and fresh." He was Secretary-Treasurer of the Harbor Company and lawful custodian of its books and records. These were not available at the trial. A receiver proceeded against Knittel in 1928 to force production of these records. It does not appear what the outcome of this proceeding was.

Knittel aided in keeping the Harbor Company books. Balance sheets of the Company for February and May 1928 are in evidence, sworn to by him. He said the advances, if made by him, should appear. These balance sheets show a liability to Croissant of \$14,616.67. They show no liability to Cleary except as to \$12,000 worth of bonds, presumably those received in December to secure his \$7,000 of notes. Knittel was unable to show that they contained any statement of a debt to him of \$24,616.67. Although receipts for cash advancements of more than \$20,000 were said to have been destroyed or lost, the Trust Company's receipts for bonds, insurance policies and stock are in evidence.

The evidence shows that Marriott was an experienced official of the Trust Company, yet Knittel, Powell and Cleary have him directing the giving of a receipt on scratch paper, in pencil, with no copy for the file, for almost \$25,000. The escrow file is in evidence. Marriott is supposed to have checked it before these men and to have found that the bonds, stock and cash deposits had been made, yet Knittel says he did not cause the transfer of the stock from the Trust Department and it is admitted that \$125,000

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worth of bonds were delivered to Kirkeby, Watts & Co. the day before the file was inspected. The escrow file contains columns for recording deposits, but none is recorded. Marriott, according to Knittel, gave a final receipt for almost \$25,000 without requiring surrender of interim receipts theretofore given.

There is in evidence a receipt given Knittel on November 3, 1927 by Abbott of the Trust Company. It shows a deposit in the trust department of 667 shares of Harbor Company stock. Under the requirements of the trust deed, this stock was additional security for the proposed bond issue. Under the September 30 real estate agreement, according to Cleary's theory, 51 per cent of the stock of the Company was to be given Cleary. The alleged escrow of November 26 provided payment to Cleary of "\$10,000 cash and stock." There was no further description of the stock. The terms, according to Cleary's theory, referred to the 51 per cent. The alleged receipt by Marriott of December 30 includes 667 shares of capital stock of Chicago Harbor Lumber Co. and \$24,616.67 cash, for escrow No. 70521. It is admitted that the Chicago Harbor Lumber Company issued only 1,000 shares of stock, and 667 shares were deposited in the trust department as collateral security under the terms of the trust deed. How could the escrow contain 51 per cent of the total issued for Cleary?

The evidence further shows that Knittel joined in the order to the Trust Company to authenticate and deliver the Harbor Company bonds to Kirkeby, Watts & Co. of November 25 and November 29. He accordingly knew, assuming that Cleary's escrow is genuine, that the order to deliver the bonds rendered performance of the escrow by the Trust Company impossible. He says he ignored

783 573

the escrow and Cleary for the purpose of saving the Harbor Company. Although Knittel rendered completion of the escrow impossible by the order of November 29, he says that on the following day he deposited \$4,000 cash with the Trust Company to complete the escrow. In other words, notwithstanding the uncontroverted evidence of Knittel's precarious financial predicament and the fear of threatened criminal prosecution for misuse of funds, he says he deposited with the Trust Company \$4,000, which he needed desperately to meet other pressing obligations, to consummate the escrow which he had already rendered impossible of consummation.

When Cleary filed his first counterclaim Marriott's lips had been sealed by death. It is conceded that Marriott in December 1927 was under no physical disability which would have interfered with his writing. The attendant or clerk who is said to have signed the receipts for him is not named by Cleary or the witnesses in his behalf. The trial court said that the strange circumstances surrounding Knittel's alleged payments cast doubt on the validity of Cleary's claim. Knittel is impeached by his own testimony which in the light of the experience of men is incredible. (People v. Bentley, 357 Ill. 82.) I think reasonable men could come to only one conclusion on the evidence, and that is that the cash deposits were not made.

6. The following are the names of the persons who have been appointed as members of the committee:

44294

NICK PAPPAS,

Appellant,

v.

J. BOBSIN & COMPANY,

Appellees.

APPEAL FROM

CIRCUIT COURT

CLACK COUNTY.

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MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to foreclose a real estate mortgage.

Karg, Hill and Duncan, hereafter called defendants, answered averring a conspiracy on the part of plaintiff and others to destroy the alleged lease of the defendants. They also counter-claimed alleging they were lessees and seeking leave to pay the mortgage indebtedness and subrogation. The chancellor gave defendants leave to pay the amounts due plaintiff and ordered them subrogated to plaintiff's rights when payment was made. Plaintiff was ordered to deliver to defendants the mortgage paper uncanceled upon payment to him of the indebtedness. He refused to accept payment or make delivery and the court dismissed the foreclosure suit for want of equity "with prejudice." Plaintiff has appealed from the decree dismissing his suit.

The mortgage notes amounting to \$12,000 were made January 30, 1934, due January 30, 1939. The debt was reduced to \$10,000 and the due date of the notes extended by an agreement made January 30, 1940 between Bobsin & Company, a corporation, maker of the notes, and Sol May, then owner and holder. The notes were not paid January 30, 1942 and the foreclosure suit was filed January 29, 1946. Harry Bobsin and Julius Bobsin, guarantors of the mortgage notes, were not made defendants. The Bobsin Company, hereinafter called the corporation, was defaulted for want of appearance or counsel.

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Defendants in their answer averred that the purpose of the suit was to destroy their lease made October 1, 1941, for ten years at a rental of \$175 a month; that this purpose was pursuant to the alleged conspiracy of plaintiff, Bobsin & Company, Harry Bobsin and Julius Bobsin; and that the corporation, and not plaintiff, was the real owner of the mortgage notes.

The counter claim alleged the lease and a covenant of quiet enjoyment; that the value of the premises was more than three times the amount of the indebtedness; the duty of the counter defendants, the corporation, Harry and Julius Bobsin to protect the defendants under the lease; the violation of that duty through the foreclosure suit brought by plaintiff for the corporation; and that the real estate involved was the only asset of the corporation. The prayer of the counter claim was in the alternative, for an injunction restraining prosecution of the foreclosure suit, or permission to defendants in default of payment within a reasonable time by the corporation, to pay the mortgage indebtedness so as to protect their leasehold and for a judgment against the corporation, Harry and Julius Bobsin for any payments made by the defendants.

Plaintiff's "reply and answer" made issue or disclaimed knowledge of most of defendants' allegations and denied they were entitled to relief. The cause was referred to a master March 25, 1947. Subsequently, April 30, 1947, an order was entered continuing plaintiff's motion for a receiver and granting leave to defendants to deposit \$12,500 with the clerk of the court as an offer to purchase the mortgage. The order recited that the deposit was subject to further order and conditioned on defendants being satisfied that the mortgage was valid and the notes valid and enforceable. It further stated that upon defendants' filing "written acceptance of their being so satisfied" and upon delivery to them of the uncanceled

mortgage paper, the amount deposited, together with any requisite additional sums, should be paid to plaintiff. The order suspended proceedings before the master until the further order of court.

The decree was entered July 1st, 1947. It found that the defendants were lessees, entitled to redeem and be subrogated to plaintiff's rights; and that the offer to pay by defendants was made to plaintiff in open court and by him refused. The decree ordered the clerk to pay to plaintiff the sum deposited and what other and further sums were required; ordered plaintiff upon receiving payment to deliver the mortgage paper to the defendants or, in default of delivery, the foreclosure suit be and "is hereby dismissed for want of equity with prejudice."; and ordered, that on payment of the money and delivery of the instrument, lessees be subrogated and that the mortgage paper was "hereby equitably assigned to defendants." The order of reference was vacated and the clerk of the court was directed to return the deposit to the defendants.

The record contains a transcript of proceedings, June 5, 1947, before entry of the decree. The proceeding consisted of a discussion between court and counsel for the parties. The court expressed the opinion that the lessee had the right to purchase the mortgage and that plaintiff was limited to payment of his debt. Plaintiff's counsel firmly refused to sell the mortgage, saying he had made no offer to sell and knew of no outright offer to purchase. He offered to take the deposit and cancel the mortgage. He conceded defendants' right to redeem from the foreclosure sale. He persisted in refusing to file any documents or make any arguments or submit authorities on the court's right to enter the orders which were included in the subsequent decree.

It is the position of the defendants that they were entitled to protect their interests in the premises by paying the indebtedness and that they were entitled to subrogation to the rights of plaintiff under the mortgage. Plaintiff says that defendants assume that they

are tenants with an interest in the land. He contends that the question as to whether they were tenants was not decided. The defendants were named in the foreclosure suit as having claimed "some interest * * * as purchasers, mortgagees, tenants, judgment creditors, or otherwise * * *." Their answer alleged the conspiracy to destroy their leasehold under the lease of October 1, 1941. Their counter claim avers that they have an interest as lessees under the lease. Plaintiff's reply and answer to the counter claim, disclaim knowledge of the lease or its terms and demand proof thereof. It is conceded that no evidence was taken on the issue. The decree, nevertheless, finds that the defendants are lessees. Plaintiff argues here as his counsel did in the trial court that no proof being made of defendants' interest in the premises, they were strangers to whom he owed no obligation to sell the mortgage paper; that he had no obligation to guarantee the validity and the enforceability of the paper under the condition attached to the offer to purchase; and that on the record the defendants were mere volunteers not entitled to pay or be subrogated.

Defendants were required to establish by evidence every averment of the cross complaint essential to entitle them to relief. 30 C.J.S. p. 845. Plaintiff called for strict proof of the lease and defendants were required to make the proof. Hooper v. Traver 336 Ill. 275.

The court committed error in finding that defendants were lessees. There was no evidence or other justification for the finding. The factual issue remained undisposed of when the decree was entered. In the absence of proof of the allegation that they were tenants, defendants were mere volunteers with no right of subrogation. Bennett v. Chandler, 199 Ill. 97. The decretal orders fall with the erroneous finding.

For the reasons given the decree is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

LEWE, P.J. AND BURKE, J. CONCUR.

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44317

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

PEARL HARRISON,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

334 A. 398

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

A writ of error was issued by the Supreme Court to review the conviction of the defendant under an information charging her with soliciting to prostitution. She was sentenced to five months' imprisonment in the Chicago House of Correction. The Supreme Court transferred the cause to this court because no constitutional question was raised in the trial court and none presented to the Supreme Court. People v. Harrison, 397 Ill. 618.

The information was filed December 11, 1943. It charged that defendant on December 10th "did then and there wickedly and unlawfully solicit to prostitution in a certain street, to wit: 1110 North Clark Street, Crystal Hotel in the City of Chicago* * *."

Defendant contends among other things that the information is insufficient in that it fails to charge whom she solicited. The information was not attacked in the trial court. For this reason the State argues that the point is waived. In order to sustain this conviction the information must charge the crime and if there is a defect in the charge which affects the merits of the offense, the defect is not waived through defendant's failure to raise the question at the trial. People v. Harris, 394 Ill. 325.

In People v. Rice, 383 Ill. 584, the Supreme Court relying on Section 9 of the Bill of Rights approved the quashing of a count in an indictment for solicitation to prostitution where neither the person solicited was named nor the place of solicitation

designated sufficiently to enable the accused to prepare a defense and plead the judgment in bar of a further prosecution for the same offense. This court reversed a judgment in People v.

Robertson, 328 Ill. App. 590 on the same grounds. In People v. Robertson, 284 Ill. 620, cited by the State, the indictment was for the offense of making, manufacturing, etc. of explosives with the intent to use the same, or that the same may be used for unlawful injury, etc. to life or property. The court held there it was unnecessary to state the names of the owners of property intended to be destroyed.

It is a fair inference from the wording of the information that the place of solicitation described is a private place. This court has held that the section of the Statute, under which the information was brought, applies only to persons who solicit to prostitution in public. People v. Robertson, 328 Ill. App. 590.

It is unnecessary to consider the other points raised.

We conclude that our decision in this case is controlled by People v. Rice, 383 Ill. 584 and People v. Robertson, 328 Ill. App. 590.

The judgment of the Municipal Court is, therefore, reversed.

JUDGMENT REVERSED.

LEWE, P.J. AND BURKE, J. CONCUR.

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deleted riders attached to the lease containing such provisions and signed the lease in duplicate in the same form as the lease made in April 1944, except for the provision for payment of rent at \$72.50 per month. Plaintiffs retained the lease signed by defendant and in June served her with a five-day notice, indicating that \$145.00 rentals were due for the months of May and June 1946. Within five days defendant tendered the \$145.00 requested, but plaintiffs refused to accept the tender because the lease was not signed in the form submitted. Plaintiffs brought suit in forcible detainer on July 1, 1946 and accepted payment of the rent on August 20, 1946 without prejudice to their suit for possession. Subsequent payments for rent have likewise been accepted by plaintiffs upon the same basis.

It is first urged that under the Price Control Act, amendment 51, effective April 1, 1945, plaintiffs are barred from demanding covenants not contained in the original lease. The pertinent provisions of the act are as follows:

"Sec. 6. Removal of tenant--(a) Restrictions on removal of tenant. So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations, by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which provides for entry of judgment upon the tenant's confession for breach of the covenants thereof or which otherwise provides contrary hereto, unless:

"(1) Tenant's refusal to renew lease. The tenant, who

had a written lease or other written rental agreement, has refused upon demand of the landlord to execute a written extension or renewal thereof for a further term of like duration, or if the lease was for a term of less than one year but more than three months and was non-seasonal in character, for a term of not more than one year, for a rent not in excess of the maximum rent, but otherwise on the same terms and conditions as the previous lease or agreement, except insofar as such terms and conditions are inconsistent with this regulation; * * *."

Plaintiffs had demanded that defendant sign a lease with the following covenants, which had not been contained in the original lease:

"It is specifically understood and agreed that the rental herein reserved is the rental for the demised premises as established by the Office of Price Administration. If this rental is changed at any time during the term of the lease the rental hereunder shall be such rental as is established by the Office of Price Administration and shall be payable at such rate from the date of determination until the expiration date of this lease; provided, however, that in the event that the rental reserved herein is increased in excess of 10% of the amount now prescribed, the Lessee shall have the right within 30 days after such rent has been established by the Office of Price Administration to cancel this lease as of the first day of any month of the term hereof by giving to the Lessor 30 days' prior written notice. Upon termination of maximum rent regulation in the Chicago Defense Area either party hereto may terminate this lease by giving to the other party sixty (60) days' notice by registered mail addressed to the addressee shown in the lease of such termination.

"Attention is specifically called by the lessor to the lessee to Clause 3 of this lease with regard to sub-letting and

assigning of premises. It is understood that the lessee shall use these premises for her own occupancy only and that no roomers or subtenants shall be permitted during the term of this lease without the written consent in each case of the lessor."

Plaintiffs knew that during the entire period of the 1944-46 lease defendant had maintained rooming accommodations. Plaintiffs' riders with reference to cancellation and subletting of the premises undoubtedly changed the covenants of the original lease, and they had no right to refuse renewal thereof without allowing the same privileges accorded in the original lease. It appears of record that plaintiffs actually returned defendant's check for \$145.00 on June 8, 1946 because the lease was not signed in the form demanded. This was a violation of the act, and under the provisions thereof plaintiffs were barred from evicting defendant as long as she remained willing to pay rent.

Defendant had notified plaintiffs of her intention to renew the lease. This is indicated by the sending of a check on April 9, 1946 to plaintiffs' renting agents in payment of rent for the month of May 1946. In Fuchs v. Peterson, 232 Ill. App. 287, the court held that in order to successfully defend a forcible entry and detainer action "it was not necessary for the defendant to show that he actually had a lease for the renewal term, but merely that he had 'placed himself in a position to entitle him to it.'" (Citing Eichorn v. Peterson, 16 Ill. App. 601; Bard v. Jones, 96 Ill. App. 370; Stanwood v. Kuhn, 132 Ill. App. 466; and Vincent v. Laurent, 165 Ill. App. 397.) Thus defendant was not required to show that she actually had a lease for the renewal term, but merely that she had placed herself in a position to entitle her to it.

It clearly appears that defendant was a hold-over tenant for another term. Section 5, chapter 80 of the Illinois Revised

Statutes, 1945, provides that "In all cases of tenancy from year to year, sixty days' notice, in writing, shall be sufficient to terminate the tenancy at the end of the year. The notice may be given at any time within four months preceding the last sixty days of the year." The giving of such notice before the expiration of the lease is mandatory, and plaintiffs could not force defendant to execute another lease after they had failed to give the required sixty-day notice, as provided by statute.

From the foregoing it is evident that the judgment of the Municipal Court was contrary to the established law and a violation of the Price Control Act of the United States which was in full force and effect on May 1, 1946, when the prior lease expired, and on September 25, 1946, when the judgment was entered. Therefore, the judgment of the Municipal Court is reversed and the cause is remanded with instructions to vacate the judgment for possession and dismiss the suit.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH INSTRUCTIONS.

Scanlan and Sullivan, JJ., concur.

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Figure 1

6. 1. 1950

44018

LEE WALKER,
Appellee,

v.

WEIGHTSTILL WOODS,
Appellant.

16 X
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

334 I.A. 619
MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On July 26, 1946 plaintiff filed a complaint in the Superior court alleging that prior to 1936 he and defendant, as practising attorneys, shared expenses in connection with the operation of a law office in the Bankers Building in Chicago; that plaintiff had expended on account of the maintenance of said law office an amount in excess of \$2700, over and above the sums expended by defendant; that on December 16, 1936 an account was stated between them, from which it appeared that there was due and owing plaintiff from defendant the sum of \$1350; that defendant "then and there prepared, signed and delivered to plaintiff an agreement in writing" under the terms of which defendant promised to pay plaintiff the said sum of money "within a reasonable time after the then stringent circumstances had been overcome and conditions were again fairly normal." Attached to the complaint was a copy of the agreement, as follows, signed by defendant: "Mr. Lee Walker: This will record our conversation yesterday, when we discussed the preliminary statement of account dated September 23rd, and your correspondence. We have agreed to adjust a settlement of those items for Thirteen Hundred and Fifty Dollars (\$1350.00) due from me to you, with the understanding that I am not to be pressed for payment and that I am to have a reasonable time after the present stringent circumstances have been overcome and conditions are again fairly normal." The complaint alleged that "the then existing stringent circumstances were overcome and conditions

became again fairly normal, and although thereafter a reasonable time elapsed and although plaintiff thereafter requested payment of said sum of One Thousand Three Hundred Fifty Dollars (\$1350.00) from the defendant, the defendant has not paid the same or any part thereof"; wherefore plaintiff demanded judgment, together with interest thereon at the rate of 5 per cent from December 16, 1936. Attached to the complaint was plaintiff's affidavit alleging that the contents of the complaint were true and that there remained due and unpaid upon the claim the sum of \$1350.00, with interest at 5 per cent, from December 16, 1936.

Defendant answered the complaint, averring that all office arrangements were ended and their office closed about July 1, 1932; that no items were authorized and none was incurred after that date; that several months before that date plaintiff abandoned the office and took full-time employment elsewhere; that plaintiff refused to accept the offer made to him by the letter of December 16, 1936; that "On the contrary Walker by his letter dated December 22, 1936 made a counter offer. Neither offer was ever accepted by the opposite party. The claim for interest has no basis of fact or in theory of law. It is mere assertion without foundation"; that all items have mutually cancelled each other by lapse of time; that both the five and ten-year statutes of limitations (Ill. Rev. Stat. 1945, ch. 83, secs. 15 and 16, respectively) have run their course on all matters mentioned; that there remained no legal obligation and nothing due at that time from either party to the other; and that the suit should be dismissed. Attached to the answer was defendant's affidavit that he had personal knowledge of the facts; that he had prepared and read the answer; and that the statements therein made were true.

After the foregoing pleadings had been filed, plaintiff

by his attorney served notice on defendant that he would at a specified time move for the entry of a summary judgment in his favor upon the affidavit of claim and complaint theretofore filed by him and defendant's answer thereto. When the matter came on for hearing, motion for summary judgment in writing was presented to the court, and after consideration of the respective pleadings and affidavits the court entered judgment in favor of plaintiff and against defendant in the principal sum of \$1350.00, with interest amounting to \$658.26, or an aggregate of \$2008.26, from which defendant has taken an appeal.

As ground for reversal it is first urged that plaintiff filed no affidavit for summary judgment and made no attempt to comply with section 57 of the Civil Practice Act or the Rules of the Court. Section 57 of the Practice Act provides that "if * * * the claimant shall file an affidavit or affidavits, on the affiant's personal knowledge, of the truth of the facts upon which the complaint or counterclaim is based and the amount claimed (if any) over and above all just deductions, credits and set-offs (if any), the court shall, upon motion, enter a judgment or decree for the relief demanded, unless the opposing party shall, by affidavit filed prior to or at the time of the hearing on the motion, show that he has a sufficiently good defense on the merits to all or some part of the claim to entitle him to defend." The issues in the case are simple. Plaintiff's affidavit accompanying his complaint verified all of the facts and substantially complied with section 57 of the Practice Act. Defendant's letter to plaintiff confirmed the agreement between the parties to adjust a settlement of their differences for the sum of \$1350, which defendant agreed to pay only with the qualifications that he was not to be pressed for payment and was to have a reasonable time after the then stringent circumstances

had been overcome and conditions should again become fairly normal. The execution and delivery of the account was not denied. In the first portion of his verified answer defendant stated that plaintiff refused to accept the offer of December 16, that on December 22 plaintiff made a counter-offer by letter, and that neither offer was accepted by the opposite party. The purported letter of December 22 is not shown of record. If defendant believed there was something that plaintiff wrote in the letter of December 22 that had any bearing upon the question, that letter should have been set forth in his affidavit. His failure so to do left nothing of record, except defendant's confirmation in writing of an oral agreement previously made.

With respect to the claim for interest, section 2, chapter 74, Ill. Rev. Stats. 1945, provides that "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due * * * on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance * * *." The judgment order from which the appeal is taken allowed plaintiff interest on his claim of 5 per cent from December 16, 1936 to date of the entry of judgment, and this was in accord with the statute.

As an additional defense it is urged that "all items have mutually cancelled each other by reason of lapse of time. Both the five and ten year statute of limitations have run their course on all matters mentioned." This assertion is not borne out by the record. In his letter of December 16 defendant agreed to pay the account. It thereby became a written contract or evidence of an indebtedness in writing, and the ten-year statute of limitations applied. Ruettinger v. Schulman, 293

Ill. App. 285. The complaint in this suit was filed July 26, 1946, within the ten-year period.

The rules applicable to the entry of summary judgment under the Civil Practice Act have, since its enactment, become well established. In Shepard v. Wheaton, 325 Ill. App. 269, the court pertinently observed that "In passing upon the motion for summary judgment, only the facts well pleaded as a defense or counterclaim are to be taken as admitted and not the defendant's conclusions therefrom," and in Gliwa v. Washington Polish Loan & Bldg. Ass'n, 310 Ill. App. 465, cited by defendant, the court said that "If it appears from facts stated in affidavits or documents that the answer pleaded is sham or false or frivolous it will be disregarded." In People v. Marx, 370 Ill. 264, the court stated that "When the complaint is sufficient, and its essential facts are admitted, it would destroy the object of the Practice act to hold that, where a party is entitled to judgment upon the complaint and answer, such judgment may be denied upon the insufficiency of the affidavit of claim filed for the purpose of proving the same facts agreed to by both plaintiff and defendant." It appearing from the verified pleadings that defendant had confirmed in writing the oral agreement previously made and had promised to pay the stipulated sum of \$1350.00 within a reasonable time thereafter, the court had no alternative but to enter summary judgment in a suit filed within the ten-year period.

Upon the record presented there can be no question but that defendant is indebted to plaintiff in the amount found by the trial court to be due plaintiff, and for the reasons indicated the judgment is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

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44068

HOWARD K. HURWITH,
Appellee,

v.

MARVIN SHAPIRO,
Appellant.

161
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought forcible detainer for possession of housing accommodations in a building of which he was the owner. Trial by jury resulted in a directed verdict and judgment in his favor, from which defendant appeals.

There is substantially no dispute as to the salient facts. Mrs. Sarah Meter occupied apartment 206 in plaintiff's building, located at 35 North Central avenue, Chicago, under a month-to-month tenancy. Meyer Davis is her brother, and Maurice L. Davis is her nephew and her attorney. The defendant, Marvin Shapiro, came to Chicago from Florida on September 6, 1946, with his wife and child, to attend Columbia College in the Fine Arts Building. He is related by marriage to Meyer Davis.

In the fall of 1946 Mrs. Meter had decided to go to California to visit her sister, with the idea of remaining there permanently if she liked that location. Through Maurice L. Davis, her attorney, she made an arrangement with plaintiff to surrender her apartment at the end of October if she should decide to remain in California, and through her brother, Meyer Davis, she arranged to have defendant occupy her furnished apartment for the months of September and October. She had already paid the September rent, and Shapiro was to pay the October rent in her name. After she left for California September 1, the local representative on the premises locked

the apartment and plugged the keyhole. When defendant arrived in Chicago with his personal luggage he was unable to gain access to the apartment. Someone who identified himself as Marvin Shapiro called Maurice L. Davis and explained the situation. Mr. Davis said he would call back after he had unraveled the matter. He then telephoned his uncle, Meyer Davis, checked on the arrangements, telephoned the landlord's agent, and then called back to tell the waiting party that arrangements had been made to admit Shapiro, that he could occupy the apartment for two months, and that if Mrs. Meter did not return at the expiration of that period he would have to yield possession to the owner of the building. Pursuant to these arrangements plaintiff's agent unlocked the door and defendant gained access to the apartment.

There is some dispute as to the details of this conversation, but the fact that defendant's stay was to be temporary is indicated by the circumstance that he called Maurice L. Davis about another apartment belonging to plaintiff, concerning which Mr. Davis had spoken to defendant. Mrs. Meter did not return to Chicago, and some time in October Maurice L. Davis talked to defendant about moving, told him that his time was up and that plaintiff wanted possession. Davis states that defendant advised him that he would not move until he was put out. The record clearly shows that defendant never talked to Mrs. Meter or to plaintiff or to any of his representatives about a lease. The arrangements under which he occupied the premises were made by Maurice L. Davis over the telephone. Thereafter defendant paid October rent for which he received a receipt, and he tendered November and December rent, which was refused. He now takes the position that so long as a tenant continues to pay the rent to which the landlord is entitled, he cannot be removed from any housing accommodations under section 6 (a), O.P.A. Rent Regulation for Housing.

The court evidently directed a verdict in plaintiff's favor on the theory that defendant was a mere licensee of Mrs. Meter, the tenant, and had no interest in her leasehold. This conclusion is borne out by the undisputed facts. When Mrs. Meter's lease came to an end, Shapiro's rights upon the premises were terminated at that time. Upon his refusal to leave he became a trespasser, and plaintiff was entitled to possession.

Another contention made by defendant is that in the absence of express restrictions by contract or statute, a lessee may sublet or assign the lease. The record discloses that no such claim was made upon trial. Shapiro never contended that Mrs. Meter had assigned her lease to him. As heretofore indicated, he had never talked to her about it, and the only evidence of the relationship between defendant and Mrs. Meter appears from the testimony of Maurice L. Davis, who told Shapiro he could occupy the apartment for two months, and that if Mrs. Meter did not come back from California at the end of that period he would have to yield possession to the owner. Shapiro had no contract with the owner, and admits that he made no lease with him. The cases cited by defendant in support of his contention, Glanz v. Halperin, 251 Ill. App. 572, and Edelman v. F. W. Woolworth Co., 252 Ill. App. 142, have no application to the facts in this proceeding. Defendant is only a licensee who had no interest in the premises. In City of Berwyn v. Berglund, 255 Ill. 498, the court distinguished between a grant and a license, and pointed out that if the conveyance granted exclusive possession against the world it was a grant, but if it merely gave privileges it was a license.

The situation presented is no different than if Mrs. Meter had continued to reside in the apartment and Shapiro and

his family had come in to live with her. He was a temporary member of her household by license, and would be required to leave when Mrs. Meter's tenancy terminated. There was never any relationship of landlord and tenant between Mrs. Meter and Shapiro nor between plaintiff and Shapiro.

From what has been said we have reached the conclusion that there is no merit to this appeal and that it was obviously taken for delay. Accordingly the judgment of the Municipal Court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

[Faint handwritten notes at the bottom of the page]

44172

G. A. BOSOMBURG,

Appellee,

v.

CATHERINE R. SCHULTZ,

Appellant.

162 A
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

334 L.A. 880

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On November 7, 1946 plaintiff had judgment by confession in the Municipal Court of Chicago for the sum of \$470.80. Execution issued and was served on defendant February 20, 1947. On February 27, 1947 defendant, by her counsel, served notice on plaintiff's attorney that she would, on March 4, 1947, appear before Judge Holland in the **Municipal** Court and move that the judgment theretofore entered be opened up and vacated and that leave be given her to file a counterclaim, and that in support of her motion she would "read the petition, a copy of which is hereto attached." Defendant states in her brief that her counsel was unable to be present in court on March 4 because of an engagement in the Superior Court, and accordingly asked another attorney to appear in his stead on the motion for which he had served notice, but that the court denied the motion because of insufficient allegations in her petition. The record merely shows that defendant filed her petition on March 4 and that her motion to vacate the judgment on that day was denied. The order of denial has never been vacated or set aside; it is still in full force and effect, and no appeal has been taken therefrom.

The record shows that subsequently on March 6, 1947 the following order was entered by Judge Holland of the **Municipal** Court: "Now comes the defendant in this cause and moves the court that the judgment by confession be vacated and set aside, which motion the Court orders entered and postponed to March 13th, 1947." The record does not show that defendant served any notice on

plaintiff of this subsequent motion on March 6. In any event, when the matter again came on for hearing March 13, defendant filed a new or amended petition to vacate the judgment, and although the record does not show any order of continuance, the matter was evidently continued until March 24, when plaintiff had leave to file his answer to the new or amended petition.

The second petition, upon which defendant relies, sets forth the foregoing proceedings and alleges that the note upon which judgment was confessed was given to plaintiff on account of attorney's fees in a proceeding in the Superior Court, cause No. 46-S-18117, wherein defendant retained plaintiff for the purpose of securing an injunction against the Chicago Flat Janitors' Union and others who were picketing a building owned by her at 3928-30 North Wayne avenue in Chicago; that for the services to be rendered defendant paid plaintiff \$300 cash and executed a \$400 note under a verbal agreement that plaintiff was to prosecute the injunction suit to its final conclusion; that plaintiff prepared and filed a lengthy complaint for injunction, prepared and placed summons, and had the matter referred to a master in chancery for hearing; that upon the hearing before the master three witnesses testified, whose testimony, comprising 86 pages, was written up, and that after the first hearing the matter was continued from October 15, 1946 to October 22, 1946 for further testimony; that after the first hearing plaintiff refused to further represent petitioner and withdrew from the case, making it necessary for her to engage the services of other counsel; that after plaintiff had withdrawn from the case defendant called on him at his office and urged him to continue in the proceeding, but that plaintiff refused and "threw petitioner out of his office"; that thereafter she demanded of plaintiff the files, together with her note, but that plain-

tiff refused to give them to her; that she then made a complaint to the Chicago Bar Association, and when one of the officials there telephoned plaintiff and requested that he deliver to defendant her files in the injunction proceeding, plaintiff turned them over to her, but refused to give her the note upon which judgment was confessed; that consideration for the note has therefore failed; and that the value of the services rendered by plaintiff in the injunction proceeding "is not over the sum of \$150.00. Wherefore petitioner asks that this petition be ordered to stand as a counterclaim of petitioner against plaintiff in this cause."

Plaintiff's verified answer to the petition avers in substance that on January 10, 1947 defendant executed a trust deed intended to be a first mortgage on her apartment building (at 3928-30 North Wayne avenue) with the Cicero State Bank as trustee; that the trust deed was recorded in the office of the Recorder of Cook County on January 14, 1947 as document No. 13975893; that said trust deed was inferior and subordinate to plaintiff's judgment lien on defendant's real estate; that by reason thereof defendant, through her duly authorized agents, requested of and received from plaintiff the execution of a document subordinating his judgment lien to the trust deed in question; that plaintiff was orally assured that his judgment would be paid promptly after title was clear and the trust deed became a first lien, but that defendant failed and neglected to pay said judgment as promised.

The record shows that on March 28, 1947 the following order was entered by Judge Holland: "This cause coming on for hearing upon the motion of the defendant heretofore entered herein that the judgment be vacated and set aside, which motion the Court overruled." Thereafter, on April 8, defendant's

counsel presented a "REPORT OF PROCEEDINGS ON MOTION TO VACATE JUDGMENT," which the court overruled, without assigning any reason therefor. The purported Report of Proceedings which defendant sought to have the court certify recited that on March 28, 1947 there came on for hearing and disposition the petition of defendant filed March 13, 1947, and "the court having considered said Petition so filed (which was the only evidence heard by the court on said motion) denied same and overruled said Motion to Vacate said Judgment heretofore entered in this cause, to which ruling of the court the Defendant, by her attorney, did then and there duly except." Since there is no report of proceedings at the trial or stenographic report, we are unable to determine if there was any hearing before the court on defendant's petition and plaintiff's answer thereto, but it is significant that defendant, when ordering a praecipe for record, called for "Transcript of Proceedings on Motion to Vacate" (item No. 9), and instead of furnishing a transcript of proceedings, which might have contained the evidence, if any, adduced upon the hearing, the foregoing document was presented, which the court refused to certify. The law is well settled that where there is a hearing before the court, pursuant to which an order is entered, but no report of proceedings at the trial or stenographic report is included in the record on appeal, the reviewing court must assume that the evidence heard sustains the order. Continental Ill. Nat. Bk. & Tr. Co. v. Tinkoff, 330 Ill. App. 247; In re Estate of Murray v. Appeal of Murray, 310 Ill. App. 121; and Bower, Inc. v. Silverstein, 298 Ill. App. 145. It is a fair inference that the court refused to certify the report of proceedings which defendant submitted because none of the evidence which may have been heard by the court was included in the report, and cer-

tainly if a hearing was had we would not be justified, in the absence of a report of proceedings, in speculating as to whether the evidence sustained the order entered.

Rule 26 of the Supreme Court (Ill. Rev. Stat. 1945, ch. 110, par. 259.26) provides that a party seeking to open up a judgment must show not only diligence but also a meritorious defense. Plaintiff's verified answer to the petition shows that defendant knew of the judgment early in January but made no effort to have it opened up until March 4, almost two months later. Furthermore, if the averments of plaintiff's petition are taken as true, defendant obtained from plaintiff an execution of a document subordinating his judgment to the trust deed which was then placed on her apartment building upon the false oral representation that the judgment would be promptly paid after title was clear and the trust deed had become a first lien. Under these circumstances her conduct would be unconscionable and she would not be entitled to the relief sought in this proceeding.

For either of the reasons herein stated we think the order of the Municipal Court from which this appeal is taken, should be affirmed, and it is so ordered.

During the pendency of this cause plaintiff moved to dismiss the appeal. We reserved the motion, and it is herewith denied.

ORDER AFFIRMED.

Scanlan and Sullivan, JJ., concur.

44093

RUDOLPH JOHNSON,
Appellant,

v.

JOHN H. SENGSTACKE and
ROBERT S. ABBOTT PUBLISHING
COMPANY, a corporation,
Appellees.

163
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

334 L.A. 620 2A

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Rudolf Johnson, filed an amended complaint in equity for injunctive relief against John H. Sengstacke and the Robert S. Abbott Publishing Company and by an amendment to said complaint he claimed that he was entitled to recover damages from the corporate defendant at the rate of \$100 a week because both defendants "have refused to pay to plaintiff the salaries due him as Mechanical Superintendent for defendant company" from and after March 29, 1946. Defendants' answer denied that plaintiff was entitled to any of the relief sought by him. After a hearing the trial court entered a decretal order which found the issues in favor of defendants and dismissed plaintiff's suit for want of equity. Plaintiff appeals. The only error assigned in this court is the alleged wrongful refusal of the trial court to award plaintiff the damages claimed by him.

While the briefs on both sides are devoted largely to a discussion concerning numerous by-laws and resolutions of the corporate defendant, the authenticity of some of resolutions and the legality of the appointment of James B. Cashin as a member of the board of directors of Robert S. Abbott Publishing Company, we deem it unnecessary to consider any of these matters except one resolution which will be hereinafter referred to.

As we view this case the material facts are

ROBERT E. ABBOTT
PUBLISHING COMPANY

JOHN E. ABBOTT and
ROBERT E. ABBOTT
PUBLISHING COMPANY

THE ROBERT E. ABBOTT PUBLISHING COMPANY

Plaintiff, Robert E. Abbott, vs. Defendant, John E. Abbott and Robert E. Abbott Publishing Company. The complaint alleges that the defendant company, which is a corporation organized under the laws of the State of Illinois, has wrongfully and unlawfully taken possession of the plaintiff's business and property, and has wrongfully and unlawfully used the plaintiff's name and reputation in its business, and has wrongfully and unlawfully caused the plaintiff to suffer damage and loss of business and property. The complaint further alleges that the defendant company has wrongfully and unlawfully caused the plaintiff to suffer damage and loss of business and property, and has wrongfully and unlawfully caused the plaintiff to suffer damage and loss of business and property. The complaint further alleges that the defendant company has wrongfully and unlawfully caused the plaintiff to suffer damage and loss of business and property, and has wrongfully and unlawfully caused the plaintiff to suffer damage and loss of business and property.

While the facts on both sides are set out in the complaint, the facts on the plaintiff's side are set out in the answer. The answer alleges that the plaintiff has wrongfully and unlawfully taken possession of the defendant's business and property, and has wrongfully and unlawfully used the defendant's name and reputation in its business, and has wrongfully and unlawfully caused the defendant to suffer damage and loss of business and property. The answer further alleges that the plaintiff has wrongfully and unlawfully caused the defendant to suffer damage and loss of business and property, and has wrongfully and unlawfully caused the defendant to suffer damage and loss of business and property.

The defendant, Robert S. Abbott Publishing Company (sometimes hereinafter for convenience referred to as the company) was and is the publisher of The Chicago Defender, a weekly newspaper. The defendant, Sengstacke, has been president, general manager and a member of the board of directors of the company continuously since January 31, 1942.

Plaintiff became an employee of the company during 1934, which was about twelve years before he filed his amended complaint herein on April 12, 1946. For three years prior to the filing of his complaint he was the mechanical superintendent of the defendant company, supervising production in five of its departments. His salary for the year immediately preceding the commencement of this suit was \$100 a week. He was not employed under a written contract nor for a stated period and he was paid every two weeks. On March 18, 1946 Sengstacke requested Johnson to resign because his work was unsatisfactory. When he refused to resign, Sengstacke discharged him and delivered to him a memorandum on the following day which read in part as follows: "If you will refer to your record of memoranda from me in regard Mechanical Department, you will find the chronological factual basis for this action." Johnson reported for work on March 19, 1946 and on March 20, 1946 and on the latter date he turned over to Sengstacke his keys, desk and whatever other effects of the company he had in his possession. He was paid for the biweekly period commencing March 19, 1946 but he performed no services for the company subsequent to March 18, 1946. On March 20, 1946 Johnson wrote a letter to "Atty. James B. Cashin, Chairman, Board of Directors, Robert S. Abbott Pub. Co.," in which he complained that Sengstacke had terminated his services as of March 18, 1946 and asked for a hearing by the board of directors before it approved his dis-

charge.

On January 31, 1942 the following resolution was adopted by the board of directors of the Robert S. Abbott Publishing Company: "Resolved that no person shall be employed or discharged without the approval of the Board of Directors."

Upon the receipt of Johnson's complaint Attorney Cashin called a special meeting of the board of directors to act on said complaint. The three members of the board of directors, Attorney Cashin, Sengstacke and George S. Dennison attended the meeting. Dennison voted to approve Johnson's discharge. Attorney Cashin voted to disapprove his discharge. Sengstacke refrained from formally voting on the question as to the approval or disapproval of Johnson's discharge upon the previous advice of his attorney to the effect that, if he did vote on said question, his action in so doing might be construed as a recognition of the legality of Attorney Cashin's election as a member of the board of directors, which he was challenging in other pending litigation.

From January 31, 1942, when the foregoing resolution was adopted, until July 23, 1946, which was more than four months after Johnson was discharged, Attorney Cashin was one of the officials who signed all checks of the company, including payroll checks, which reflected the changes in its personnel, due to employees being "hired and discharged." At the time of the trial the company had a staff of about 125 employees. Between January 31, 1942 and July 23, 1946 about 300 employees were either hired or discharged by Sengstacke personally as president and general manager of the company or with his approval and his conduct in this regard was never questioned by the board of directors or any member thereof. In not a single instance was the employment or discharge of

1990

these 300 persons approved by a formal written resolution of the board of directors of the company. Sengstacke discharged various employees in Johnson's department upon the latter's recommendation. Among others discharged by Sengstacke during the aforesaid period was Johnson's predecessor as mechanical superintendent, the company's auditor, its editor-in-chief, its city editor and another mechanical superintendent. Attorney Cashin knew of all these discharges and not one of them was approved by a formal written resolution of the board of directors.

According to Johnson, he was unable to secure employment for twelve weeks after his discharge or until June 17, 1946, when he was employed in a similar capacity by the St. Louis Argus at a salary of \$65 a week.

Although defendants questioned the legality of the election of Attorney Cashin as a member of the board of directors of the company and the authenticity of the aforementioned resolution of the board of directors of January 31, 1942, we will assume for the purposes of this appeal that Attorney Cashin was lawfully elected and that said resolution was authentic.

Plaintiff's theory is that "no interruption occurred in his employment by defendant company - he merely suffered an interference therein, caused by the unauthorized act of defendant Sengstacke" in attempting to discharge him without the approval of the board of directors as required by the aforesaid resolution.

Defendants' theory is that "even if this particular resolution had been properly adopted by the Board of Directors, it became a nullity because it had been waived repeatedly by the Board of Directors" and that, "therefore, the plaintiff, whose contract was terminable at will, has no claim or basis of any claim against the defendants."

Plaintiff contends that "he is entitled to his compensation as mechanical superintendent of the defendant company at the rate of \$100 per week, for twelve weeks, and thereafter is entitled to compensation at the rate of \$35 per week, which represents the difference between the pay which he has been receiving in St. Louis and his \$100 per week salary from the defendant company, and that this compensation will be due him until the Board of Directors of the defendant company discharges plaintiff as provided for in its by-laws."

It is conceded that ordinarily the president and general manager of a corporation has authority to discharge an employee of the company with or without cause, when the employee has no stated term of employment but his employment is terminable at will and it must be further conceded that this rule is applicable to plaintiff's discharge, unless he was protected in his employment by the failure of the board of directors to approve his discharge in accordance with the resolution of January 31, 1942, which provided that "no person shall be employed or discharged without the approval of the Board of Directors."

Inasmuch as this resolution had not been invoked by any member of the board of directors for more than four years after its adoption and during that period every member of said board had full knowledge of the fact that Sengstacke as president and general manager of the company had "hired and discharged" about 300 of its employees, it must be held that the board of directors waived or abrogated said resolution, which in legal effect is the same as a bylaw, by nonuse thereof. In Bay City Lumber Co. v. Anderson, 111 Pac. (2d) 771, the Supreme court of Washington said at p. 777:

"Subject to certain limitations, a corporation can, by custom, usage, or acquiescence, or by unanimous consent and continuous action, change or modify any by-law. 2 Thompson on Corporations, (3d ed.), 523, 530. Unless prevented by charter

or statutory provisions, and subject to the qualification that vested rights cannot be taken away or impaired, a corporation has the power at any time, to alter, amend, or repeal by-laws adopted by it. It may also waive them, and this it may do expressly or impliedly. If it acts or contracts in disregard of a by-law with the consent or acquiescence of the stockholders or members, that is a waiver of the by-laws. 3 Clark & Marshall, Private Corporations, 1951, 1952. Nonuse of a by-law by corporate officers, continued for a sufficient length of time to bring it home to the stockholders, will work its abrogation. Blair v. Metropolitan Savings Bank, 27 Wash. 192, 67 Pac. 609; Huxtable v. Berg, 98 Wash. 616, 168 Pac. 187."

Plaintiff makes the following assertion in his reply brief: "It is so clear and elemental that a waiver or an estoppel by waiver could only be pleaded or set up as a defense against one whose action created it, such waiver or estoppel by waiver cannot affect strangers to the acts which created or out of which the estoppel arises. In this case the plaintiff, Johnson, was not a party to any of the acts which, by any stretch of imagination, created the estoppel or waiver which is being asserted by the defendants."

A simple and sufficient answer to plaintiff's position in this regard is that he had no rights or right of action under the resolution in question to waive. The resolution was nothing more than a family matter, as it were, among the members of the board of directors of the company. It was not intended for the protection and benefit of its employees and formed no part of their contract of employment. In the capacity in which plaintiff was employed he had no access to the records of the board of directors and it is a fair inference from all the evidence in the record that he did not know until after his discharge that this resolution had been adopted by the board of directors and that he was then apprised of its existence solely for the purpose of injecting more dissension and discord into the already turbulent affairs of this company.

We are impelled to hold that since plaintiff's employment was at will, there is no liability on the part of defendants by

-7-

reason of his discharge.

For the reasons stated herein the decretal order of the Superior court of Cook county is affirmed.

DECRETAL ORDER AFFIRMED.

Friend, F. J., and Scanlan, J., concur.

Regimental Headquarters

To the Honorable Secretary of War, Washington, D.C.

Subject: Report of the 1st Cavalry Division, 1918

Very respectfully,
The Adjutant General

Enclosed for the Adjutant General are 10 copies of the report of the 1st Cavalry Division, 1918.

44134

SEVENTH HEAVEN, INC., a
corporation,

Appellee,

v.

SOUTH SIDE FIREPROOF STORAGE,
INC., a corporation, et al.,
Appellants.

164
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

38-1.4.631

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by defendants, South Side Fireproof Storage, Inc. and Sam D. Terrell, seeks to reverse a judgment entered February 28, 1947 in a forcible detainer suit tried by the court without a jury granting the possession of the premises involved herein to plaintiff, Seventh Heaven, Inc.

Plaintiff filed this action on February 1, 1947 to recover possession of a two-story warehouse on premises owned by it at 4706-08 South State street, Chicago, Illinois. The defendants were in possession of said building under a written lease which expired January 31, 1947. They were served with a written notice on August 15, 1946, informing them that plaintiff had purchased the property and had elected "not to renew your lease," that "your tenancy * * * will terminate on January 31, 1947" and that "you are now hereby required to surrender possession of said premises on that day."

Defendants' counsel stated upon the trial that their sole defense was that they had entered into an oral agreement in July 1946 with the former owners of the premises for an extension of their lease for one year from January 31, 1947, the date of its expiration, and they made an offer of proof to that effect. Upon the objection of plaintiff's attorney that the Statute of Frauds precluded the enforcement of the purported oral agreement, the trial judge rejected said offer of proof and thereupon rendered judgment on February 17, 1947 awarding

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plaintiff possession of the premises.

Notwithstanding that such judgment was rendered by the trial court after a hearing with all parties present or represented by counsel, the minute clerk in said court incorrectly entered on the half-sheet of the file in the case "an ex parte judgment for possession in favor of plaintiff by default."

On February 21, 1947 defendants filed a notice of appeal from the judgment order as entered by the clerk on February 17, 1947 and on the same day had an appeal bond approved by a judge other than the trial judge without notice to plaintiff.

Upon due notice to defendants' attorney plaintiff filed and presented a motion on February 27, 1947 to strike the notice of appeal and the appeal bond, to dismiss defendants' appeal and "to correct the half-sheet to show that the cause was not heard after the default of the defendants and on an ex parte hearing, but rather through the appearance of the defendants and on a hearing before the Trial Judge." After a hearing on said motion the trial judge dismissed defendants' appeal of February 21, 1947 and instructed the minute clerk to correct the half-sheet to reflect the truth as to the proceedings before him on February 17, 1947, when he rendered judgment granting plaintiff possession. The clerk then entered the following order on February 27, 1947, which also failed to conform with the judgment rendered by the trial judge and the proceedings had before him on February 17, 1947:

"By order of Court to correct the reading of the file to read:

"By agreement jury waived and cause submitted to Court and trial by Court February 17, 1947, and remainder of the order to stand referring to order of February 17, 1947"

" * * * Hearing on motion to strike Appeal Bond and

and to dismiss the appeal and order of Court entered to strike appeal bond and to dismiss the appeal."

After the entry of the foregoing order, plaintiff's attorney ordered a writ of restitution from the execution clerk of the Municipal court. The execution clerk did not consider that the judgment order as entered by the minute clerk on February 27, 1947 was in proper form and the file in the case was returned to the trial court on February 28, 1947, so that the judgment order of February 27, 1947 might be revised and corrected. Thereupon the trial judge on his own motion and without notice, instructed his minute clerk to enter an order correcting the order of February 27, 1947, which purported to correct the order of February 17, 1947. This revised judgment order, entered on February 28, 1947, speaks the truth as to the judgment rendered by the trial judge and the proceedings had before him on February 17, 1947. It is from the judgment order of February 28, 1947 that defendants prosecute this appeal, notice of same having been filed on March 4, 1947.

Defendants first contend that "the court erred on February 28, 1947 in entering an order without notice to these defendants or their attorneys, striking defendants' appeal bond and dismissing defendants' appeal when no proceedings were pending before him and defendants were not present in court." In making this contention defendants, inadvertently or otherwise, misstate the facts. The order dismissing defendants appeal from the judgment order of February 17, 1947 and striking their appeal bond was not entered on February 28, 1947 but on February 27, 1947. We prefer to believe that such misstatement was unintentional rather than deliberate. As has been seen, the only order entered on February 28, 1947 was the judgment order correcting the misprisions of the clerk in entering the orders of February 27, 1947 and

and February 17, 1947 and it was this revised judgment order of February 28, 1947 that was entered without notice on the court's own motion. But defendants' attorney did receive timely notice that plaintiff would present a motion on February 27, 1947 for the entry of an order dismissing their appeal of February 21, 1947. Since defendants' only objection here to the order dismissing their appeal of February 21, 1947 and striking their appeal bond is that said order was entered without notice to them and since the record discloses that they did have notice that a motion would be presented by plaintiff on February 27, 1947 for the entry of such order, it must be held that there is no merit to the instant contention.

Defendants next contend that "the court erred on February 28, 1947 in entering an order modifying or correcting the judgment entered on February 17, 1947 when no proceedings were pending before him, and neither the defendants nor their attorneys were present; that the entry of said order of February 28, 1947 without notice to these defendants or their attorneys constitutes reversible error." There is no merit in this contention. It will be recalled that defendants were present or represented by counsel when the proceedings were had which resulted in the judgment rendered by the trial court on February 17, 1947, which judgment and proceedings were erroneously entered by the minute clerk assigned to said court; that after timely notice to defendants the court directed the minute clerk to enter the judgment order of February 27, 1947 for the purpose of correcting the mistakes that said clerk had made in entering the judgment on February 17, 1947; and that on the following day, February 28, 1947, the trial judge, on his own motion and without notice, merely directed the clerk to enter the revised judgment order to correct the mistakes which the clerk made when he entered

the order on February 27, 1947.

It was not claimed in the trial court and it is not claimed here that the revised judgment order of February 28, 1947 is not a true reflection of the proceedings before the trial judge that resulted in the judgment rendered by him on February 17, 1947. In a situation such as that presented here, where only one day intervened between the entry of the improper order on February 27, 1947, due to the misprision of the clerk, of which order defendants had notice, and the entry of the proper judgment order on February 28, 1947, the rule is that a court has the power and right, without notice, to correct apparent clerical mistakes in its own orders so as to make them speak the truth. In Rogers et al. v. Trudzinski et al., 329 Ill. App. 179 (abst. opinion), it was said on page 5 of the opinion - No. 43519:

"Nor was it necessary that notice shall be served upon the parties before the error of the clerk was rectified by the proper order of May 1. All the parties were present in court on April 27 when the trial judge made his finding, and the order of May 1 confirmed legally the finding of the court announced on April 27th. Only four days intervened between the trial of the case and the entry of the order on May 1. The principle is well established in this State that a court has control over its own judgment, records and orders; and has the power and right to correct apparent clerical mistakes or misprisions in them so as to speak the truth. People v. Lyle, 329 Ill. 418; People v. Uschold, 257 Ill. App. 176; and Sellis v. Grand Trunk Western Ry. Co., 206 Ill. App. 45."

Defendants also contend that "the court erred in denying the defendants the right to submit evidence of a waiver of one of the provisions of the written lease by parol evidence." There is not the slightest merit in this contention and the record discloses that defendants had absolutely no defense on the merits to plaintiff's claim for the possession of the premises in question. The instant contention could only have been intended to be misleading and confusing. The only question discussed by defendants under this point is that the trial court deprived them of their right to submit evidence of an oral waiver of a provision of the written

lease. Not only do they fail to mention the provision of the written lease which they now assert was waived but the only issue raised by them in the trial court was their claimed right to submit evidence of an oral contract which was unenforcible under the Statute of Frauds. The only offer of proof made by defendants was that the former owners of the premises entered into an oral agreement with them in July 1946 to extend the written lease for a period of one year commencing January 31, 1947, the expiration date of said written lease and, as has been seen, this offer of proof was rejected by the trial court.

It is the established law of this state that a verbal lease for a period of one year to commence at a future date is legally ineffective because of section 1 of the Statute of Frauds (par. 1, chap. 59, Ill. Rev. Stat. 1945), which prohibits the enforcement of an oral contract that "is not to be performed within the space of one year from the making thereof." (George J. Cook Co. v. Kaiser, 163 Ill. App. 210; Leindecker v. Schaeffer, 194 Ill. App. 508; Sear v. Moore, 172 Ill. App. 351.)

The rule is just as firmly established that an offer to prove a verbal lease for one year to commence at a future date is properly rejected by reason of the prohibition contained in the foregoing section of the Statute of Frauds. (Rader v. Huffman, 125 Ill. App. 554.)

The motion heretofore made by plaintiff to dismiss defendants' appeal was reserved to hearing. Inasmuch as we have determined this appeal on its merits, said motion is at this time denied.

For the reasons stated herein the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

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The first of these is the fact that the
 system of taxation is not uniform. The
 rate of tax varies from one district to
 another, and the amount of tax is not
 proportional to the value of the property.
 This is a serious defect, and it is
 necessary to reform the system. The
 second defect is that the system is not
 based on the principle of equality. The
 rate of tax is not the same for all
 classes of property, and the amount of
 tax is not proportional to the value of
 the property. This is a serious defect,
 and it is necessary to reform the system.
 The third defect is that the system is
 not based on the principle of justice. The
 rate of tax is not the same for all
 classes of property, and the amount of
 tax is not proportional to the value of
 the property. This is a serious defect,
 and it is necessary to reform the system.
 The fourth defect is that the system is
 not based on the principle of efficiency.
 The rate of tax is not the same for all
 classes of property, and the amount of
 tax is not proportional to the value of
 the property. This is a serious defect,
 and it is necessary to reform the system.
 The fifth defect is that the system is
 not based on the principle of simplicity.
 The rate of tax is not the same for all
 classes of property, and the amount of
 tax is not proportional to the value of
 the property. This is a serious defect,
 and it is necessary to reform the system.
 The sixth defect is that the system is
 not based on the principle of transparency.
 The rate of tax is not the same for all
 classes of property, and the amount of
 tax is not proportional to the value of
 the property. This is a serious defect,
 and it is necessary to reform the system.
 The seventh defect is that the system is
 not based on the principle of accountability.
 The rate of tax is not the same for all
 classes of property, and the amount of
 tax is not proportional to the value of
 the property. This is a serious defect,
 and it is necessary to reform the system.
 The eighth defect is that the system is
 not based on the principle of fairness.
 The rate of tax is not the same for all
 classes of property, and the amount of
 tax is not proportional to the value of
 the property. This is a serious defect,
 and it is necessary to reform the system.
 The ninth defect is that the system is
 not based on the principle of equity.
 The rate of tax is not the same for all
 classes of property, and the amount of
 tax is not proportional to the value of
 the property. This is a serious defect,
 and it is necessary to reform the system.
 The tenth defect is that the system is
 not based on the principle of justice.
 The rate of tax is not the same for all
 classes of property, and the amount of
 tax is not proportional to the value of
 the property. This is a serious defect,
 and it is necessary to reform the system.

the front door led to the second floor. A hallway on the first floor led back to the rooms on the first floor. In the hallway, and before getting to the living rooms of the defendant, there was located the only bathroom and toilet in the house. In such bathroom there was a door which opened into the living room of defendant. Defendant furnished the heat, light and water, and the plaintiff paid \$13.00 per month rent. Defendant had a switch on the first floor by means of which he could shut off the lights on the second floor, and he was accustomed to shutting off such lights about midnight.

On the night of February 27th the plaintiff went down the stairway and back through the hallway and bathroom to the door leading to the living rooms of the defendant. Plaintiff testified that his child then had whooping/cough, and that the purpose of such visit was to request the defendant to keep the lights on during the night on account of the illness of the child, that he knocked on the door of defendant's quarters and defendant called to him to come in, that he then requested defendant to keep the lights on on account of the child being ill, and the defendant told him if he didn't like it to move, that defendant then drew a revolver from his dresser drawer and ran toward plaintiff with a cane and the revolver, that plaintiff went out on the porch to see if he could get something to protect himself where he found a small rope about six feet long, and then went back in the hallway with the rope in his hand, that defendant then swung his cane at plaintiff and plaintiff swung the rope at defendant, and defendant then shot the plaintiff.

Defendant testified that when the plaintiff came into the room plaintiff asked why the lights had been turned off the night before, and defendant told him the light bill was so big he was going to turn them off at midnight, that plaintiff then asked defendant to come out in the alley and fight it out, and defendant told plaintiff that defendant was in no shape to fight and told plaintiff to get out, that plaintiff did not leave so defendant got his gun, that plaintiff then went out and defendant followed him, that plaintiff then hit defendant with a bucket which was in the bathroom and defendant then picked up the cane, that plaintiff then came back into the hallway with the rope and was swinging it over defendant's head and plaintiff threw a cup at defendant which hit defendant's nose, and defendant then shot plaintiff. Plaintiff denied striking defendant with either the bucket or the cup.

The testimony of each was corroborated by other witnesses. However, as the case is presented, we do not consider it necessary to make a further detailed statement as to such evidence.

The shot, fired from a 38 caliber revolver, penetrated the wall of the abdomen of plaintiff. Plaintiff was operated on and his abdomen opened the same night, but the bullet was not removed until May 11th. Plaintiff was in the hospital 33 days, his hospital bill was \$567 and his doctor bill was \$350. The uncontradicted evidence is that another operation will be necessary which will cost about \$150 or \$200, as a result of which plaintiff will be confined in a hospital for two or three weeks and will be incapacitated for work for about three months. Prior to the

operation plaintiff was earning \$40 to \$60 a week as a truck driver, but at the time of the trial, on account of inability to do full work, his wages were from \$25 to \$30 per week.

The only alleged error is that the court erred in giving instructions numbered 1 and 2 at the request of plaintiff. Number 1 told the jury that under the pleadings the burden of proof was on defendant to prove by a preponderance of the evidence that the assault was made in necessary self defense, and that in making the assault the defendant used no more force than was necessary to protect himself. In Gizler v. Witzel, 82 Ill. 322, 326, and in Hale v. Harms, 257 Ill.App. 388, 393, practically identical instructions were approved.

Plaintiff's instruction number 2 told the jury that a person in repelling an assault has no right to use greater force than, under the circumstances, he believes to be reasonably necessary for self protection, and, if he does, he will be liable for the excessive force used. This instruction was more favorable to the defendant than the rule of law applicable. In Doyle v. Cavanaugh, 139 Ill.App. 359, 362, an instruction given for defendant told the jury that the defendant in defending himself had the right "to use such force as the defendant then believed was reasonably necessary under the existing circumstances." In passing on this instruction the court said, "This is not an accurate statement of the law. The instructions should have told the jury that his belief must have been such as a reasonable person would have entertained under the circumstances." (See Ogden v. Claycomb, 52 Ill. 365.)

4. *Conclusions*—The results of this study indicate that the use of a single, low-dose, short-acting benzodiazepine, such as lorazepam, is an effective and safe method of sedation for the conscious, cooperative, and nonventilated patient. The use of a single, low-dose, short-acting benzodiazepine, such as lorazepam, is an effective and safe method of sedation for the conscious, cooperative, and nonventilated patient.

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

Moreover,

~~A~~ne instruction for defendant told the jury that defendant had the right "to defend himself against bodily harm in whatever manner seemed reasonably necessary." Another such instruction told the jury that if they believed "that the injuries inflicted by the defendant on the plaintiff were inflicted by him in his necessary self defense, then you should find the defendant not guilty." Another such instruction told the jury that if they believed that plaintiff first assaulted defendant, then defendant had the right to repel the assault by the use of reasonable force, and if the jury believed it was reasonably necessary for defendant to shoot plaintiff to protect himself, then such shooting by defendant was justifiable and the jury might find defendant not guilty.

In view of the foregoing, it is our opinion that there was no reversible error in the giving of the instructions complained of.

The judgment of the trial court is affirmed.

Affirmed.

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Abstract

General Number 9590.

Grand Number 6.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

MAY TERM, A. D. 1948

CHESTER A. LOCABEE and
HAZEL B. LOCABEE,

Plaintiffs-Appellees,

-VS-

LABEL T. HOLMAN,

Defendant-Appellant.

APPELLATE COURT OF ILLINOIS
OF PECON COUNTY.

334 I.A. 622

~~WILLIAM H. H. H. H. H.~~

~~Judge Presiding.~~

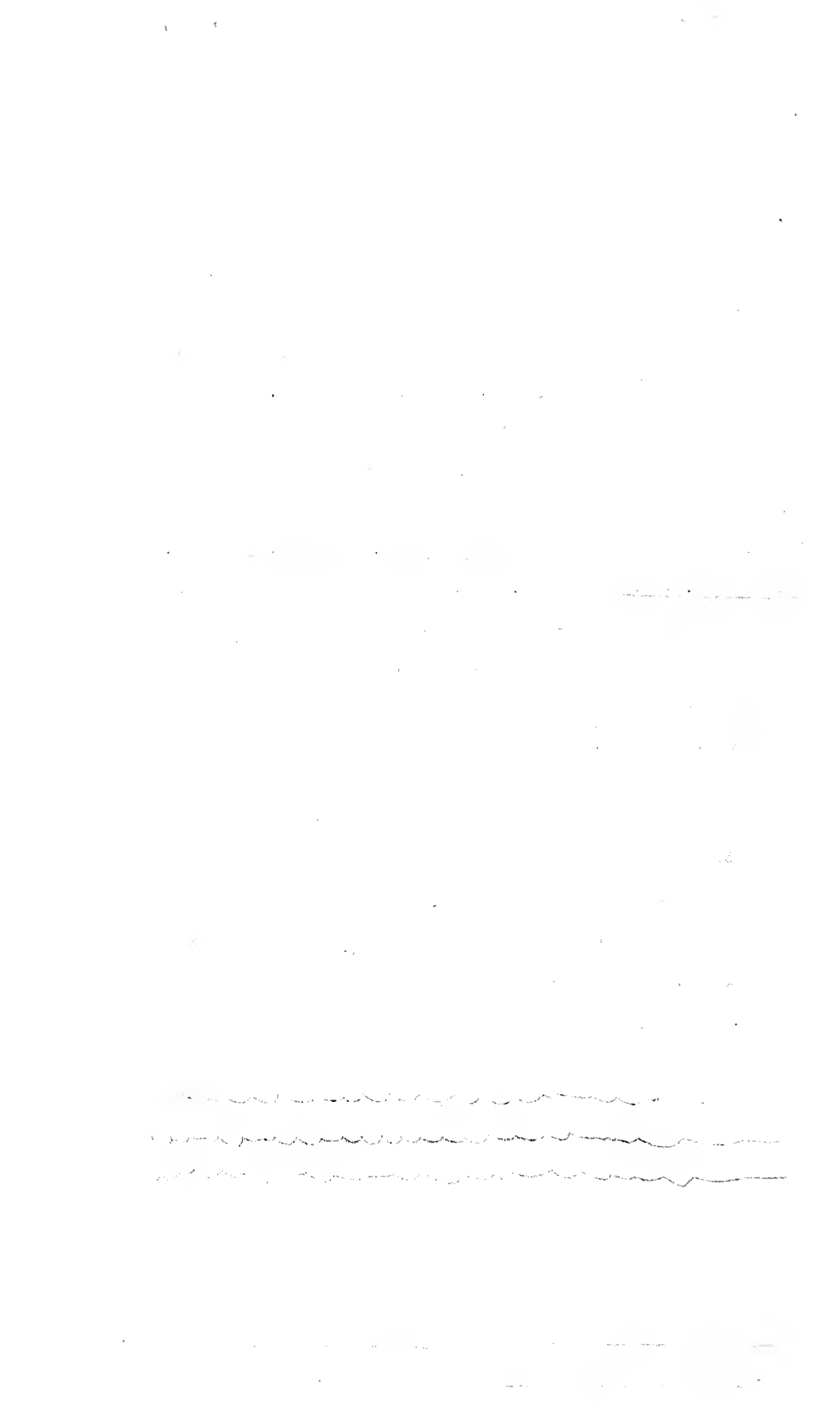
HAYES, J.:

Defendant Label T. Holman was the owner of a farm in Pecon County, Illinois which she conveyed to the plaintiffs, Hazel B. Locabee and Chester A. Locabee on June 17, 1944. This suit was commenced by plaintiffs on December 8, 1944 and was based on a complaint consisting of two counts. Count I alleged that defendant represented that the farm in question contained 80 acres whereas in fact it contained 73.03 acres. Count II alleged that at the time of the conveyance defendant did not own 1.34 acres of the premises described in her warranty deed. The Circuit Court of Pecon County who heard the case, without a jury, found for plaintiffs on both counts and rendered judgment against the defendant in the sum of \$2,265.25. Defendant has appealed to this Court.

2.

Defendant contends as to Count I that one at no time represented that the farm in question contained 80 acres and further that even if such representation were made, plaintiffs had no right to rely upon it. It is clearly the law of this state that in the absence of circumstances putting a reasonable person on inquiry, a person is justified in relying on a representation of a material fact without making further inquiry. Hustelink v. Vilina, 352 Ill. 271; Windsley v. Johns, 120 Ill. 469. Thus, assuming defendant misrepresented the number of acres in the farm, the question remains as to whether circumstances existed at the time of the negotiations for the sale that would put a reasonable person on inquiry.

It appears from the record that Hazel B. Lossene, one of the plaintiffs, testified that prior to the sale she had seen a plat of the farm which indicated that there was less than 80 acres in the tract. That being so we believe that plaintiffs were not justified in relying on defendant's statements, if such were made, that the farm contained 80 acres. Plaintiffs had ample opportunity to investigate the records of the acreage of the farm before the sale was consummated. ~~In fact it appears that they discovered the shortage after the sale when they checked the records in the recorder's office and the county treasurer's office.~~ They cannot now be relieved of the consequences of their negligence since the means of ascertaining the fact alleged to have been misrepresented was easily available to them. Morrel v. Masalski, 333 Ill. 41; Bundesen v. Lewis, 368 Ill. 623; Dickinson v. Dickinson, 305 Ill. 521.



3.

As to Count II defendant contends that there was no competent evidence before the Circuit Court from which the exact acreage of the tract could be determined. Specifically, defendant contends that the Court erred in admitting a surveyor's plat, a portion of which was based upon a railroad survey recorded in the recorder's office of Macon County of a curve in a railroad right-of-way. While it is true that without proof of its accuracy, the railroad survey would be inadmissible and any plat based upon it likewise subject to objection, Monmouth Mining & Mfg. Co. v. Hemler, 49 Ill. App. 385, there is proof in the record that the surveyor who platted the tract in question here, checked the angles and numbers shown on the railroad survey and found that they agreed with the distances on the ground. We therefore believe that sufficient foundation was laid for the introduction into evidence of the plat of the farm and that it was properly admitted into evidence.

As to Count I the judgment of the Circuit Court of Macon County is reversed; as to Count II the judgment of the Circuit Court of Macon County is affirmed and the cause is remanded to that Court with direction to enter judgment for plaintiffs in the sum of \$464.75.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.

Gen. No. 10155

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
May Term, A. D. 1947

RILEY FORDYCE,
Plaintiff-Appellee,
vs
WALLACE ELIFSON,
Defendant-Appellant.)
Appeal from
Circuit Court,
Lee County.

Bristow, J.

Riley Fordyce, plaintiff-appellee, on the night of June 28, 1946, entered the saloon of Wallace Elifson, the defendant-appellant. Fordyce was an elderly man rapidly approaching seventy. Elifson was a robust person of thirty-two years and weighing 180 pounds. Fordyce was slightly intoxicated, and upon resisting the demand of the defendant to leave the premises, received injuries in an altercation that ensued.

A complaint was filed in the Circuit Court of Lee County by Fordyce consisting of three counts, charging defendant in various ways with wilfully, wantonly and maliciously throwing, striking and beating him, thus causing the fracture of his pelvic bone and otherwise injuring him. Defendant denied these charges and pleaded self defense. He also pleaded that plaintiff was intoxicated, noisy, profane and extremely obnoxious, and that he refused to leave the premises when urged to do so. Upon the trial of the issues thus presented, the jury returned a verdict in favor of the plaintiff, awarding him \$2500. The usual motions followed, and were denied by the trial court. This appeal followed.

THE HOUSE OF REPRESENTATIVES

IN SENATE

WEDNESDAY, JANUARY 1, 1913

REPORT

OF THE

COMMISSIONERS OF THE GENERAL LAND OFFICE

IN RESPONSE TO A RESOLUTION

PASSED BY THE SENATE

ON JANUARY 1, 1913

AND BY THE HOUSE OF REPRESENTATIVES

ON JANUARY 1, 1913

WASHINGTON

GOVERNMENT PRINTING OFFICE

1913

THE HOUSE OF REPRESENTATIVES

IN SENATE

WEDNESDAY, JANUARY 1, 1913

REPORT

OF THE

COMMISSIONERS OF THE GENERAL LAND OFFICE

IN RESPONSE TO A RESOLUTION

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THE HOUSE OF REPRESENTATIVES

IN SENATE

WEDNESDAY, JANUARY 1, 1913

There is a most remarkable variance between the testimony of the witnesses for the plaintiff and defendant concerning what happened on the night of June 28, 1946 in the defendant's saloon. About the same number of witnesses appeared and testified in behalf of each litigant. According to those who testified for Fordyce, the following is what happened. LeRoy Adams related that he first observed the plaintiff in front of Elifson's tavern; that the plaintiff and defendant engaged in some conversation, and both disappeared into the tavern; that immediately thereafter the defendant threw the plaintiff down the front steps and onto the sidewalk; that the defendant and someone else picked plaintiff up and carried him back into the tavern, threw him upon the floor twice and twisted his arm back of him and marched him to the rear of the saloon to call the police; that he, Adams, asked defendant for permission to take the man home and defendant's reply was, "No, he is going to jail." Adams also testified that the defendant further said that anyone that came around his place causing a disturbance was going to be treated the same way, and that defendant said that he could not beat him on the street, but if he got him on the inside, it was alright to beat him, and that he, Fordyce, could not do anything about it.

It appears that plaintiff did go to the defendant's place of business on the night in question in search of a man by the name of Bishop; that he had had the customary "few beers"; that a policeman called on behalf of defendant put it this way, "It would be hard to say that he was intoxicated. He had been using intoxicating liquor." And it further appears that as a consequence of the injuries received on that night, the plaintiff suffered a broken pelvic bone; that at the time of the trial, October 16, 1946, the plaintiff was still on crutches and was unable to work; that at the time of his injury, he was receiving \$57.72 per week; and that the doctor^{and} hospital bills

were in excess of \$300.

As we have indicated heretofore, the defendant's version is quite different. It was as follows. The plaintiff was drunk and noisy, and when the defendant refused to sell him any beer, he became enraged and struck the defendant several times. Elifson testified that he only did what any reasonable person would do under like circumstances, and that Fordyce's injuries were the result of his own drunken behavior.

When you read the appellant's presentation of what the record appears to indicate, you cannot escape the conclusion that the defendant, on the occasion in question, acted with extraordinary chivalry and gentlemanly restraint. On the other hand, appellee's story is convincing of the fact that Elifson was far more brutal and vicious and used more force than the circumstances warranted.

The jury and the trial court saw and heard the witnesses. They placed their stamp of approval upon the plaintiff's claim. We do not find the slightest justification for determining otherwise.

If the plaintiff's evidence is believable, it abundantly shows that the defendant's plea of self defense is without merit.

The most important argument urged by appellant to justify a reversal, and one not without merit, is the giving of an instruction on behalf of plaintiff which was as follows: "The Court instructs the jury that before you may find the defendant not guilty upon the ground that he assaulted and beat the plaintiff in necessary self-defense of his person, you must be satisfied, solely from the evidence, of the facts introduced at the trial, and from no other fact or circumstance, that such assault and beating of the plaintiff was done by the defendant in necessary self-defense of his person." In instructions in a civil action which require proof to the satis-

faction of a jury have frequently been condemned. It doubtlessly imposes a higher degree of proof than is imposed by law. Brent v. Brent, 14 Ill. App. 256; Herrick v. Gary, 83 Ill. 85; Protection Life Insurance Company v. Dill, 91 Ill. 174. Counsel for appellee frankly admits that it was a mistake that such instruction was given, but contends that the error involved therein was not fatal or one that should invariably warrant reversal. We are of the opinion that the verdict and judgment herein represent substantial justice, and we are convinced that the giving of the erroneous instruction contributed little if anything to the result obtained by the jury. - Shooster v. Jefferson Ice Co., 328 Ill. App. 124; Brady v. Mangle, 109 Ill. App. 172.

Other errors are urged, but we deem them of little consequence after giving them our serious consideration.

JUDGMENT AFFIRMED.

Done J. Wessels.

10155

Abstract

Gen. No. 10155.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM A. D. 1947.

| | | |
|-----------------------|---|----------------|
| RILEY FORDYCE, |) | |
| Plaintiff-Appellee, |) | |
| vs. |) | Appeal from |
| |) | Circuit Court, |
| WALLACE ELIFSON, |) | Lee County. |
| Defendant-Appellant.) |) | |

WOLFE,-- P. J.

On account of a faulty instruction in this case, we granted a rehearing at the request of the appellant. After again considering the evidence, and the instructions, we adhere to our former decision. The judgment of the trial court is hereby affirmed.

Affirmed.

Judge Dove dissents.

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1947
General Number 10203

CHICAGO-ROCKFORD MOTOR EXPRESS, INC.,
A Corporation,
Plaintiff-Appellant,

vs

BRUNO CAGNONI and ALFRED CAGNONI,
Copartners d/b/a/ OVER-NITE MOTOR
SERVICE,
Defendants-Appellees,

and

BRUNO CAGNONI and ALFRED CAGNONI,
Copartners d/b/a/ OVER-NITE MOTOR
SERVICE,

Defendant, Counter-
Claimants-Appellees,

vs

CHICAGO-ROCKFORD MOTOR EXPRESS, INC.,
A Corporation,
Plaintiff, Counter-
Defendant-Appellant.

33-1A-623

Appeal from

Circuit Court,

Winnebago County,

Honorable

William R. Dusher,

Judge Presiding.

Bristow, J.

This appeal comes from the Circuit Court of Winnebago County, wherein the Over-Nite Motor Service recovered a judgment on its counterclaim against the Chicago-Rockford Motor Express, Inc. in the sum of \$3,405.50. Appellant, the Chicago-Rockford Motor Express, Inc., had a truck proceeding in an easterly direction on Route 20 about four miles east of Belvidere. Appellee's truck was traveling in a westerly direction on the same highway, and was involved in a collision with appellant's truck. Each contended that the other was driving on the wrong side of the pavement.

THE UNITED STATES OF AMERICA

DEPARTMENT OF THE ARMY

HEADQUARTERS, ARMY MEDICAL DEPARTMENT

General Number 10800

TO: THE CHIEF, ARMY MEDICAL DEPARTMENT, WASHINGTON, D. C.

FROM: THE CHIEF, ARMY MEDICAL DEPARTMENT, WASHINGTON, D. C.

SUBJECT: [Illegible]

1. [Illegible]

2. [Illegible]

3. [Illegible]

4. [Illegible]

5. [Illegible]

6. [Illegible]

7. [Illegible]

8. [Illegible]

It will be unnecessary to detail the testimony of each witness, but suffice it to say that there was a conflict in the evidence as to which truck was at fault. The jury and the trial court were evidently convinced that appellant's truck crossed the black line and side striped appellee's truck, thus causing the accident and the resulting losses. A reading of the record convinces us that the jury was justified in their findings.

The sole question presented on the review is as to whether an error in a given instruction on behalf of appellee warrants a reversal and remandment for new trial.

The instruction in question reads as follows:

"The Court instructs the jury that if you find from the preponderance or greater weight of all of the evidence the following propositions:

First: That the counter-plaintiffs, Alfred Cagnoni and Bruno Cagnoni, doing business as Over-Nite Motor Service, and their agent and servant, at the time of the accident in question and immediately prior thereto, exercised that degree of care and caution for their own safety which an ordinarily prudent person similarly situated would have exercised for his own safety or the safety of a motor vehicle he was then and there driving;

Second: That the counter-defendant, Chicago-Rockford Motor Express, Inc., a corporation, by its agent and servant, was negligent and careless in driving and managing its motor vehicle at the time of the happening of the accident in question and immediately prior thereto; and

Third: That such negligence, if any, of the said counter-defendant was the proximate cause or contributed proximately to cause ~~of~~ the accident in question;

Then and in that event you may find for the counter-plaintiffs,

Can. Term. 12

Alfred Cagnoni and Bruno Cagnoni, doing business as Over-Nite Motor Service, and against the counter-defendant, Chicago-Rockford Motor Express, Inc."

This instruction ignored the fact that the complaint charges specific negligence, in that appellant drove its truck across the black line and at a high and dangerous rate of speed, and states that if appellant is guilty of any negligence, appellee may recover. The following cases support appellant's criticism: Carnahan v. Public Service Co. 276 Ill. App. 277, 279; Herring v. Chicago & Alton R. R. Co., 299 Ill. 214, 217.

In the Herring case, supra, the court said: "an instruction of this character permits a jury to wander afield and return a verdict against the defendant for what they might fancy to be an act of negligence, though the act so considered by them to be negligence was one which the law would not recognize as actionable. In a case where the evidence is as conflicting as it is in this case, the fact that the law may be correctly stated in other instructions will not obviate the error committed in giving a bad instruction."

On behalf of appellee, the court gave the following instruction: "The Court instructs the jury that Chicago-Rockford Motor Express Inc. the plaintiff, cannot recover in this case against the defendants, Alfred Cagnoni and Bruno Cagnoni d/b/a/ Over-Nite Motor Service, unless such plaintiff has proven by a preponderance of the evidence, each of the following propositions:

First: That Chicago-Rockford Motor Express, Inc., was exercising ordinary care for its own safety as defined in these instructions at and immediately prior to the time of the accident in question;

Second: That the defendants were guilty of negligence and that

such negligence, if any, caused or contributed to cause the damages as stated in these instructions, at or immediately prior to the time and place of the accident;

Third: That such negligence if any, if the same has been proven by a preponderance of the evidence, was the proximate or direct cause of the injury to such plaintiff, and if from the evidence plaintiff has failed to prove all of such propositions or has failed to prove any one of them, then such plaintiff cannot recover and you should find the defendant, Over-Nite Motor Service, not guilty."

We are of the opinion that the judgment entered herein represents substantial justice; that the same result would have obtained had the error complained of been eliminated. The sole contention made by appellant and appellee throughout the trial was that the other truck crossed the black line onto the wrong side of the pavement. Entertaining the view that the jury was not misled by the erroneous instruction, and that the jury reached a fair and reasonably proper result, we do not believe this cause should be reversed.

In the case of Rievitz v. Chicago Rapid Transit Co., 327 Ill. 207, the trial court incorporated into the instruction the entire declaration, and inasmuch as some of the charges contained therein were not proven by the evidence, it was recognized that the instruction tended to confuse the jury. The Supreme Court of Illinois in refusing to reverse the decision on that ground stated at p. 213: "The office of instructions is to give information to the jury concerning the law of the case for immediate application to the subject matter before them. The test, then, is not what meaning the ingenuity of counsel can at leisure

attribute to the instructions, but how and in what sense, under the evidence before them, and the circumstances of the trial, ordinary men acting as jurors will understand the instructions."

In Chicago City R. Co. v. Shaw, 220 Ill. 532, an instruction as to the credibility of a witness was inaccurate in that it required the intentional or deliberate false testimony of the witness to be "palpable" before it could be disregarded. With reference thereto the Supreme Court of Illinois stated at p. 536: "We do not regard the instruction as one that should be given as it is desirable to avoid inaccuracies of expression of legal propositions; but absolute accuracy is a thing seldom to be attained, and courts are not for the want of it, alone, to set aside verdicts, but are only justified in doing so in cases where the inaccuracy is of such a character that the court must feel that it is likely that the jury were misled thereby."

These Supreme Court cases were cited with approval and quoted in the Appellate Court case of Kavanaugh v. Washburn, 320 Ill. App. 250, where the court discussed at great length the rules with reference to jury instructions. At p. 255, the Court said: "If the instructions as a whole when viewed in the light of the evidence, show no tendency to confuse or mislead the jury with respect to the principles of law applicable to the issues in the case, then minor irregularities when considered as an abstract proposition of law should not be permitted to control, where it appears the complaining party's rights have not thereby been prejudiced. Juries are not versed in legal phraseology nor fine legal distinctions. Instructions are handed to the trial judge at the close of the case, and just before argument. "Naturally, they are partisan in character with each litigant endeavor-

ing to present his contentions in as skillful and forceful manner as possible. It is inevitable that a trial judge in the midst of a hotly contested case will sometimes fail to detect all the language of the various instructions that may be inadvertently used. However, modern tendency favors a liberal application of the harmless error doctrine to instructions when it appears the rights of the complaining party have in no way been prejudiced."

In view of the foregoing, we are of the opinion that the judgment should be affirmed.

JUDGMENT AFFIRMED.

Dove, J. :

In my opinion it was reversible error for the trial court to give the admittedly erroneous instruction which directed a verdict for appellees. I therefore respectfully dissent.

Dove, J.

In my opinion it was reversible error for the trial court to give the admittedly erroneous instruction which directed a verdict for appellees. I therefore respectfully dissent.

330 124
Gen. No. 10232

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1948.

| | | |
|----------------------------------|---|------------------|
| JOSEPH MARTIN and LUTHER MARTIN, |) | |
| |) | |
| Plaintiffs-Appellees, |) | Appeal from |
| |) | Circuit Court, |
| vs |) | Lee County. |
| |) | |
| NELLIE STRANSENBACK, Administra- |) | Honorable |
| trix of the Estate of EDWARD |) | George C. Dixon, |
| STRANSENBACK, Deceased, |) | Judge Presiding. |
| |) | |
| Defendant-Appellant. |) | |

334 I A 624

Bristow, J.

A suit was filed in the Circuit Court of Lee County by Joseph Martin and Luther Martin, plaintiffs, against Nellie Stranssenback, as Administratrix of the Estate of Edward Stranssenback, deceased, seeking damages as a result of an automobile accident.

On January 11, 1946, at about two o'clock in the afternoon, the accident took place at a point about five miles south of Rochelle, Illinois on U. S. Route 51, which is a two lane concrete highway. Luther Martin, the owner of the automobile, was driving in a southerly direction with his brother, Joseph Martin, asleep in the front seat beside him. Edward Stranssenback was driving his car in a northerly direction with his wife, Nellie Stranssenback, seated at his side when the two cars collided on a curve. Edward died soon after the accident, and Mrs. Stranssenback defends this suit as administratrix.

It was snowing at the time of the accident, and the snow, although less than an inch in depth, obliterated the view of the black line which marks the center of the pavement. Driving conditions and visibility were not good.

IN THE

COURT OF THE DISTRICT OF COLUMBIA

IN RE

THE ESTATE OF JAMES A. HARRIS, DECEASED

Plaintiff

vs.

Defendant

THE DISTRICT OF COLUMBIA

By and through its

Attorney

JOHN H. HARRIS, JR.,

Defendant

FILED

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office

this 10th day of May, 1935, at the City of Washington, D.C.

JOHN H. HARRIS, JR.,

Defendant

Attorney

JOHN H. HARRIS, JR.,

Defendant

By and through its

Attorney

JOHN H. HARRIS, JR.,

Defendant

By and through its

Attorney

JOHN H. HARRIS, JR.,

Defendant

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office

this 10th day of May, 1935, at the City of Washington, D.C.

JOHN H. HARRIS, JR.,

Defendant

Shortly before the trial, a motion supported by an affidavit was filed by Joseph Martin seeking a severance of his cause of action from that of his brother. This motion was resisted very strenuously by appellant, but to no avail. No doubt appellee had given some thought to the proposition that if the two causes were severed, Luther Martin would be a competent witness on the trial of Joseph's claim. Appellee's resistance, no doubt, stemmed from the same line of thinking. We are of the opinion that the court did not err in allowing the severance, and we are further of the view that Luther Martin was a competent witness upon this trial.

The case relied upon by appellant, Blachek v. City Ice and Fuel Company, and Herbert Reinke, 311 Ill. App. 1, 22-23, is clearly distinguishable from the instant case. There it was the Fuel Company's truck which was being operated by Reinke, their agent, in course of his employment. The reviewing court in passing on the propriety of the trial court's action in denying a severance said: "It should be borne in mind that the primary liability was on the defendant Reinke, and that the corporation is only liable under the doctrine of Respondeat Superior." Luther had no interest in whatever judgment might be recovered by Joseph Martin, and if a witness has no interest in the result of the proceeding in which he is called, he is not incompetent to testify against one being sued in a representative capacity. Ward v. Williams, 53 Ill. App. 56; Wuebbles v. Shea, 294 Ill. App. 157.

Other contentions are made by appellant on this appeal, such as, abuse of discretion of the trial court in denying appellant's motion for continuance and receiving in evidence certain photographs which do not show snow upon the pavement. But, we believe their contentions are without merit.

However, there was an instruction given on behalf of appellee that has been held bad repeatedly, and the giving of which we feel constitutes reversible error. The instruction was as follows: "The Court instructs the jury that you cannot in any case single out the fact, even though you find it to be a fact, that the plaintiff was asleep at the time of the alleged injury and from the fact alone decide that the plaintiff was not exercising due care for his own safety and there is no rule of law which prescribes any particular act to be done or omitted, under the variety of circumstances which may arise, for it is impossible to announce such a rule. The only requirement of the law is that the conduct of the person injured shall be consistent with what an ordinary prudent person would or might do under the circumstances." Just recently this court had occasion to consider an instruction containing a similar vice. Hanneken v. Eichler (1947, Second District), 332 Ill. App. 437. The instruction there read as follows: "The court instructs the jury that a pedestrian upon a sidewalk may assume that the same is in a reasonably safe condition for traveling. He is not absolutely bound to keep his eyes constantly fixed on the sidewalk in search of possible holes or other obstructions or defects therein. And while it is the law that a person passing along a sidewalk in a city is required to use ordinary and reasonable care to avoid danger, what is such care depends upon the circumstances of each particular case, and that is a question for the jury to decide in this case. You are further instructed that if you believe from the evidence that the plaintiff, Albert H. Hanneken, in this case, turned while walking along the street to speak to someone, that in itself is not necessarily contributory negligence, or want of ordinary and reasonable diligence or care for his own safety." In that case the court held: "The cases are numerous and uniformly hold that the question of what a reasonable and prudent man would do for his own safety under

a particular set of circumstances must be left to the jury as one of fact, and that it is prejudicial error to instruct the jury that a certain set of facts constitute or do not constitute negligence if negligence has not been shown as a matter of law. Conklin Construction Co. v. Walsh, 131 Ill. App. 609; Chicago & A. R. Co. v. Anderson, 166 Ill. 572; West Chicago St. R. Co. v. Luka, 72 Ill. App. 60; Chicago B. & Q. Co. v. Dougherty, 12 Ill. App. 181; Pennsylvania Co. v. McCaffrey, 173 Ill. 169; West Chicago St. Ry. Co. v. Callow, 102 Ill. App. 323; North Chicago St. Ry. Co. v. Williams, 140 Ill. 27. In the case of Lindberg v. Chicago City Railroad Co., 83 Ill. App. 433, the court had before it a very similar instruction to the one herein question, to-wit: '2. The court instructs the jury that even if you believe from the evidence that the plaintiff attempted to board the car in question while the car was in motion, that fact, if it be a fact, does not necessarily charge the plaintiff with contributory negligence as a matter of law. The question is still for the jury, whether, in view of that fact and of all the other facts and circumstances of the case, the plaintiff was or was not exercising ordinary care, under the circumstances for his own safety.' The court there said, 'It presents a correct statement of the law but is argumentative. It undertakes to tell the jury what is not 'necessarily' and 'as a matter of law' negligence. It is calculated to impress the jury with an argument that the very fact most relied upon by the defendant as constituting contributory negligence need not be so considered by them. It is undoubtedly a correct proposition that the jury might have determined that this fact did not constitute contributory negligence, but they should have been left to reach such a conclusion, if at all, by their own determination of what did, under the circumstances, constitute ordinary care. The majority of the court are of the opinion that the giving of the second of the foregoing instructions in a case where the evidence is so conflicting requires a reversal of judgment.'

The foregoing analysis applies to the situation under consideration. It was a question of fact for the jury to determine whether appellee was guilty of contributory negligence. Ordinarily it would be only remotely possible for a jury to reach the conclusion that a passenger in a car, lying or sitting asleep, was guilty of any negligence that proximately contributed to cause the accident. Yet here we have a different situation--- for at the time of the accident in question, it was snowing, and the edges and center line of the pavement were obscured by snow. The jury could reasonably entertain the view that appellee, being the only other person in the car other than the driver, should have remained awake and assisted the driver under such adverse driving conditions. Such conduct might well be expected of an ordinarily prudent person riding under similar circumstances. The error in the instruction could easily have misled the jury, thus making the error one of harmful and reversible character.

It is our conclusion, therefore, that this cause should be reversed and remanded for new trial.

CAUSE REVERSED AND REMANDED.

The foregoing analysis applies to the situation under consideration. It was a question of fact for the jury to determine whether the driver was guilty of contributory negligence. Ordinarily it would be only reasonably possible for a jury to reach the conclusion that a passenger in a car, lying on either side, was guilty of any negligence that proximately contributed to cause the accident. But here we have a different situation--for at the time of the accident, it was snowing, and the edges and center line of the roadway were covered by snow. The jury could reasonably entertain the view that the driver, being the only other person in the car other than the driver, should have remained awake and assisted the driver under such adverse driving conditions. Such conduct might well be expected of an ordinarily prudent person riding under similar circumstances. The error in the instruction could easily have misled the jury, thus taking the error out of harmful and reversible character. It is our conclusion, therefore, that this error should be reversed and remanded for new trial.

CAUSE NO. 10-1000 AND REM. 1000.

674
IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1948.
General Number 10238

| | | |
|------------------------------|---|-------------------|
| JOSEPH JASIEK, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court |
| |) | LaSalle County |
| vs |) | |
| |) | |
| GEORGE KOLOWSKI, Administra- |) | Honorable |
| tor of the Estate of Paul |) | Louis A. Zearing, |
| V. Kolowski, Deceased, |) | Judge Presiding. |
| Defendant-Appellant. |) | |

Bristow, J.

Joseph Jasiek, appellee, was the owner of fifteen shares of preferred stock of Matthiesen and Hegeler Zinc Company of LaSalle, Illinois. Paul V. Kolowski resided in the home of appellee from 1939 until the time of Paul's death in 1943. Prior to 1939, appellee was employed at the zinc company, but in that year he became seriously ill; was hospitalized for several weeks; and, in consequence of his illness, he became so disabled that he was unable to work again.

Joseph Jasiek and Paul Kolowski were very close friends for many years. They often discussed their financial problems with each other. Joseph said that one day Paul had told him that he, Joseph, should transfer his preferred stock in the Zinc Company to him, else it might affect his standing with the relief agency in the town of La Salle. This was done, and Paul continued to hold the stock, collect the dividends, turning the same over to Joseph until the time of Paul's accidental drowning on July 3, 1943. It was further testified that Paul said he would return the stock to Joseph upon request. After

General Number 10338

his illness, Joseph became quite destitute and greatly impoverished, but despite his adversity, he refused to sell or pledge his stock. He had great faith in the company where he had been employed, and the stock did increase in value considerably. The value of the stock plus accrued dividends now is approximately \$3000.

George Kolowski was appointed administrator of Paul's estate, and the fifteen shares of stock were inventoried as assets therein. Appellee filed a petition in the Probate Court of La Salle County setting forth that he was the owner of said stock and asking for an order on the administrator to turn the stock over to him. The petition read as follows: "and was receiving relief from the Township Supervisor of LaSalle Township"---"that the said Paul V. Kolowski advised your petitioner that said preferred stock be transferred to him, the said Paul V. Kolowski, and stated that he would hold the same for your petitioner and return it to him upon request, otherwise it might affect the standing of your petitioner with the relief agency if it became known that he, the petitioner, owned said preferred stock;".

Appellant filed a motion to dismiss the petition. No affidavits were attached to the motion, nor was there any testimony heard on the subject. This motion was denied, whereupon an appeal was perfected to the Circuit Court of La Salle County, and the cause heard de novo.

On September 18, 1947, the Circuit Court overruled appellant's motion, and entered a rule to answer on or before October 18, 1947. Appellant refused to answer, and asked that a final order be entered so that an appeal would properly lie to this court. The appellant was then defaulted for want of an answer or other pleading. Appellee's petition was taken as confessed, and only testimony touching

the question of damages was entertained. The trial court, thereafter, entered an order directing the appellant to deliver the stock and dividends to appellee. From this order the appeal taken brings the cause here for review.

It has been the contention of the appellant throughout that appellee is not entitled to prevail in the matter because the contract that gave rise to this controversy was tainted with fraud, was illegal and against public policy.

Appellant in his brief cites many authorities in support of eight different attacks that are made upon the legality of the contract under consideration. The first point is: "Contracts to deceive a public officer in the performance of his duties are contrary to public policy and void." But, the petition under consideration does not set forth any contract with a public officer nor is there any showing that any public officer was deceived by Joseph's transferring his stock to Paul.

The second point raised is: "Jasiek was receiving relief at the time of the stock transfer. He fraudulently continued to receive relief thereafter." There is involved in this charge the assumption that Joseph continued to receive relief after the transfer. Appellant had every opportunity to offer proof of this fact, but he failed to do so. Certainly, it would not be fair to indulge in such presumption in order for appellant's estate to be unconscionably enriched.

The third point is: "Fraudulently conniving to secure relief is declared unlawful." There is no proof whatsoever that Jasiek did any conniving to secure relief. He was receiving relief before the questioned transfer, but there is no proof about how he obtained the same.

The fourth point is: "Contracts for the performance of an act declared unlawful by Statute are void." The answer - contained in appellant's brief on this proposition deserves repeating, and is as follows:

"Again the defendant-appellant must assume that there was a contract for the performance of an act declared unlawful by statute, whereas the petition fails to disclose any such contract. Nor aught that appears in the petition; the Plaintiff-Appellee may have received no relief after the transfer was made, and may have returned any money previously paid to him for relief. If all of the assumptions relied upon by the Defendant-Appellant were true, he could have set such matters up in an answer and proven them very easily. However, it must occur to the Court that the Defendant-Appellant has diligently avoided filing either an affidavit or an answer. He must necessarily feel that he is in no position to appear in Court on the merits of the case. The Plaintiff-Appellee, on the other hand, has never had an opportunity to present any evidence to the Court except on the question of damages, and would have welcomed an opportunity to present the entire matter to the trial court. The Defendant-Appellant is apparently content to attempt to benefit by the acts of his intestate in setting in motion what he chooses to consider a conspiracy to defraud the Supervisor of LaSalle County--whereas the real conspiracy was to illegally acquire property for himself which belonged to the Plaintiff-Appellee."

All the other contentions made by appellant are vulnerable to the same answer, heretofore indicated. It was Paul Kolowski who suggested that Jasiek transfer his stock to Paul. Whether or not the parties were in pari delicto, and the contract was an illegal one and against public policy was capable of being proven if appellant had chosen to do so. The matters relied upon by appellant are in the nature of an affirmative defense, and should have been set up in an answer and proof offered in support thereof. Instead, reliance is placed

upon unjustified assumptions and unwarranted inferences. Therefore, their many authorities cited have no bearing upon the problem under consideration. The factual situations appearing in the cases cited and the facts appearing in proof in the instant case are only remotely analogous.

It is the opinion of the Court that judgment should be affirmed.

JUDGMENT AFFIRMED

O.K.
GWB.

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Gen. No. 10236

Agenda No. 17

IN THE
APPELLATE COURT
OF

33-1.A. 625

ILLINOIS

* * * * *

SECOND DISTRICT

* * * *

FEBRUARY TERM, A. D. 1948

512
600g

THE FOUR WHEEL DRIVE
AUTO COMPANY, a corporation
Plaintiff-Appellee

vs

BLACKHAWK MACHINE COMPANY,
a corporation
Defendant-Appellant

APPEAL FROM THE
CIRCUIT COURT OF
WINNEBAGO COUNTY

Dove, J.

In the first count of its amended complaint the plaintiff alleged that the parties hereto had, during the years 1943, 1944 and 1945, a large number of business transactions whereby the defendant furnished certain accessories or parts for trucks which the plaintiff was then building for the United States Government; that on January 5, 1945 the plaintiff ordered from the defendant the machining of 110 axle housings to be delivered at the rate of 15 per day starting February 1, 1945 for which the plaintiff was to pay defendant \$16.54 each, that defendant refused to carry out

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$\frac{1}{\sqrt{\pi}} \int_{-\infty}^{\infty} f(x) e^{-x^2} dx = \frac{1}{\sqrt{\pi}} \int_{-\infty}^{\infty} f(x) e^{-x^2} dx$

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said order according to its terms and only tooled a small number of said housings and none of them were in accordance with the specifications and all were rejected by the plaintiff and the order cancelled. It was further alleged that in connection with said order the plaintiff agreed to pay defendant not to exceed \$1500.00 as a tooling charge, which amount the plaintiff paid. It was then alleged that in addition to said sum of \$1500.00 defendant made an additional charge for tooling of \$5661.83 against the plaintiff, that plaintiff refused to pay this additional amount and so advised the defendant. That on March 19, 1945 defendant sent to the plaintiff a statement of account showing a balance due from the plaintiff to the defendant of \$2914.35 but in arriving at the balance plaintiff averred that defendant had included said rejected additional tooling charge of \$5661.83.

The first count of this amended complaint then alleged that the United States Government had threatened to take out of the defendant's plant certain machines which the Government had leased to the defendant and in order to assist the defendant in keeping their machines plaintiff paid large sums of money to the Treasurer of the United States on behalf of the defendant and on July 13, 1945 paid to the United States Treasurer the sum of \$895.31 on behalf of the defendant. It was then averred that the difference between said sum of \$5661.83, the rejected tooling charge, and \$2914.35, the balance which defendant on November 19, 1945 insisted was due it from the plaintiff ~~XXXXXXXXXXXX~~ is \$2747.48 and it was for this amount plus said sum of \$895.31 which

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1924-1925

plaintiff alleges it paid the Treasurer of the United States for and on behalf of the defendant, aggregating \$3642.79 that the plaintiff demanded judgment.

The second amended count, in addition to realleging some of the matters set forth in the first amended count averred that prior to January 10, 1946 the parties hereto had a large number of business dealings and transactions with each other; that on January 10, 1946, at the plant of the defendant in Rockford, representatives of both companies examined their several claims and accounts against each other and then and there struck a balance and it was then and there agreed by and between the parties that the defendant was indebted to the plaintiff in the sum of \$3642.79. It was then averred that the defendant then and there agreed to pay the plaintiff that amount and on January 14, 1946 plaintiff sent to the defendant a confirmation of that agreement and subsequently made demands for payment thereof but payment was refused by the defendant and in order to recover that amount this suit was instituted and this count likewise demanded judgment for \$3642.79.

In its answer the defendant admitted the course of business between the parties and the placing of the order for machining the tools as alleged. It denied the non-performance of the order for machining the axle housings and denies the cancellation of its contract. The answer also denied that the tooling charges were limited to \$1500.00, admits that an additional tooling charge of \$5661.83 was made by it and insists it is properly made, it denied that this additional tooling charge was disallowed by the plaintiff, admits the payments of large sums to the United States Treasurer by the plaintiff on behalf of the defendant including the sum of \$895.31.

but insists that all these payments were taken into account and reflected in the balance of \$2914.35 which defendant ~~denied~~ insists is due it from the plaintiff. ~~as~~ to Count 11, defendant denied generally that there was an account stated and filed a counterclaim seeking to recover of the plaintiff said sum of \$2914.35.

After the issues had been made up a hearing was had before the court resulting in a judgment for the counter-defendant in bar of the counterclaim and in favor of the plaintiff and against the defendant for \$3642.79. From this judgment defendant and counter-claimant appeal.

From the pleadings and evidence it appears that the plant of the plaintiff is located in Clintonville, Wisconsin and during the war plaintiff was building trucks for the government. During this time it did considerable business with the defendant, the defendant's plant being located in Rockford, Illinois. Early in December 1944 representatives of the companies discussed the tooling of axle housings for trucks which plaintiff was then engaged in constructing. The quantity plaintiff desired, the rate of delivery and price per unit were considered. Earl Miller, superintendent of the defendant, testified that the price of \$16.54 per unit which he submitted on behalf of the defendant was based upon the order of 550 pieces with a renewal. Mr. Olen, representing the plaintiff in these negotiations testified that after the first order for 110 pieces was received by Miller, he had a telephone conversation with Miller in which he, Olen, told Miller that if the defendant could give the plaintiff delivery, he, Miller, need not worry about more business because he, Miller, would get it. On December 7, 1944 defendant wrote the plaintiff:

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"This will confirm Mr. Miller's telephone quotation for the front axle housing right No. 21598 of \$16.54 each with tooling cost total of \$1550.00." Thereafter and on January 5, 1945 plaintiff sent to the defendant a purchase order for one hundred ten of the quoted axle housings at the quoted price of \$16.54 each, the order reciting, "a ceiling total charge of \$1550.00 will be allowed covering all required tools. Any tools furnished by us to be deducted from ceiling price." This order further recited that delivery was to start February 1, 1945 at the rate of fifteen per day and all material was to be furnished by the plaintiff.

The evidence further discloses that on January 9, 1945 25 pieces of rough castings were received by the defendant from the plaintiff. Deliveries began on April 17, 1945 and continued through April 25, 1945. Twenty-one of these housings were rejected. Seventeen of the twenty-one were reworked, retained in the shop of the plaintiff and the remaining four were returned to the defendant as scrap. The returned castings were duly credited by the defendant on its account with the plaintiff and the charge of \$23.50 made by plaintiff for re-tooling the seventeen housings was accepted by the defendant company.

Other than the 25 pieces of rough castings, no other material was ever forwarded defendant by the plaintiff and under date of June 20, 1945 defendant submitted to the plaintiff an invoice dated May 31, 1945 for balance due and tooling costs in the amount of \$5661.83 supported by a detailed statement designated as a settlement proposal. The plaintiff received these on June 25, 1945 and on June 26, 1945 replied as follows, viz:

"We are returning herewith your invoice No. 4287-5-H along with a settlement proposal against our purchase order BPF-182. We regret we cannot honor your invoice in the amount of \$5661.83 for a contract totaling only \$1819.40 plus a machine tool charge of \$1550.00 and in the event you are not familiar with the history of this particular transaction, we would like to outline the circumstances in the following paragraphs.

"Our P.O.B.P.F-182 was issued to you under date of January 5, 1945 and covered a total quantity of 110 pc. of our part No. 21598 axle housing. It was definitely stipulated on this order that delivery was to start February 1, 1945 at the rate of fifteen per day. There is no question in our minds that this order was accepted by you, as you definitely performed on this contract. The first shipment of 25 pc. of rough castings was received at your plant on January 9 according to your own receiving report, copy of which we have (No. 07015) which is evidence that we did furnish you with the necessary castings as that delivery could have been made on the date stipulated. Initial delivery of two housings was made to us on April 17, which was approximately ten weeks beyond the date stipulated on our order. In addition to the initial shipment we find that our records show that on April 18 we received 5 finished housings, April 19 - 6, April 20th - 8, April 21st - 5 and April 25th - 1.

"Not only were you as a sub-contractor considerably late in delivering these housings to us, but you did not deliver the 15 per day which was stipulated. Your inability to meet our required schedule made it necessary for us to put this job back into our own shop, causing considerable confusion here due to the fact that machines which were tied up on other work had to take over so as to enable us to meet our required schedule as stipulated by our contracting agency.

"We would also like to refer you to the following rejection reports of which copies were forwarded to you and which you can undoubtedly locate in your files: No. 9608, 9709, 9711, 9712, 9710 and 9708. If you will thoroughly review the rejection reports referred to, you can readily appreciate that the quality of the work done on the castings furnished you was not at all satisfactory and was not to our blueprint or specification.

"In view of all the above outlined circumstances, we regret that your invoice No. 4287-5-H is unwarranted and any claims against the cancelling of our order BPF-182 will not be allowed."

1-1-1947
The first of the year
has been a very busy one
for the office. We have
received many inquiries
from the public and have
been able to answer them
in a timely manner.

Our work has been
very satisfactory and we
have been able to keep
the public informed of
the progress of our work.
We have also been able
to complete many of the
projects which have been
assigned to us. We are
very pleased with the
results of our work and
hope to continue to
improve our service to
the public in the future.

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After this letter defendant continued as plaintiff's source of supply for other items and remittances were made by plaintiff to the defendant. At various times plaintiff also paid, at the request of the defendant, substantial sums of money including the payment of \$895.31 on July 13, 1945 to the United States Treasurer. In the early part of October 1945 defendant sent the plaintiff an itemized statement of account covering the transaction of the parties from March 29, 1945 to October 1945 and this included the rejected tooling item of \$5661.83. On November 16, 1945 plaintiff's manager of accounts wrote defendant and specifically explained to the defendant that the item of \$5661.83 "may be expected upon receipt from our Termination Department of your invoice No. 4287-H in the amount of \$5661.83 covering your termination claim". On December 13, 1945, the assistant to the General Manager of the plaintiff wrote the defendant: "This will confirm our 'phone conversation of this afternoon regarding a charge of \$5661.83 as shown on your recent statement to us. We pointed out that under date of June 26 the writer wrote you with respect to this charge, at which time we could not accept this claim or charge on our order BPF-182. If you will refer to that letter it will give you the details of this transaction and our reason for not accepting the charge. Your statement showed that we owe you \$2914.35 and this amount includes ~~xxx~~ the \$5661.83 charge. Deducting the \$5661.83 indicates you owe us a balance of \$2747.69." The letter then refers to the payment by the plaintiff to the U.S. Treasury of \$895.31 and concludes: "the total amount due us would be \$2747,69 plus \$895.31 or \$3643.00. You stated that you wanted to get into this situation a little bit ^{further} ~~further~~ before making a commitment and that you would call us within a day or two as to the

outcome of your findings. No doubt the fact that you owe us money rather than our owing you may be attributed to the fact that we were making payments directly to the U.S. Treasury on the basis of 50% of the amount shown on your invoices and the balance directly to Blackhawk and the fact that these invoices were paid promptly accounts for the amount being due us."

The evidence is further that on January 10, 1946 two of plaintiffs' executives went to Rockford and met Mr. Bradley, president and general manager of the defendant company. Mr. Bradley testified that previously Mr. Klaus, general manager of the plaintiff had wired that he was coming to Rockford to check over their account. Mr. Bradley's version of this meeting as abstracted is that when Mr. Klaus arrived he introduced Mr. Marceil, manager of accounts payable of the plaintiff. "We checked accounts. I brought up the \$5661.00. Mr. Klaus said, 'We can't pay it. That is cancelled. When are you going to pay the difference and he had some figures there. I said - "I don't know, if we owe it we will pay it-" He said 'Can't you make some arrangements to pay it?' I said: 'If we owe you money we will be glad to make arrangements to pay it. As I recall it one of them said: 'if you don't make some arrangement they were going to stay there until we did and they were discussing that we owed them money. I don't recall any agreement, only a proposal on their part. I told them I didn't have any money to pay out. They suggested that we try to pay \$750.00 a month. I told them 'I still don't think we owe you any money. I did not tell Mr. Marceil and Mr. Klaus on January 10 that Blackhawk would pay Four-Wheel Drive the sum of \$3642.79."

According to the testimony of Mr. Klaus he, Mr. Marceil, and Mr. Bradley discussed this account of \$3642.79, that Mr.

Bradley stated that they had spent more than anticipated or estimated on tooling and didn't feel that the entire amount we asked was justified and asked that it be reduced. "We said, No. Bradley said he was in no position to settle and we worked out an agreement for Blackhawk machine to pay in full \$750.00 per month. As I recall it the amount was agreed upon by both parties." Marceil testified: "in company with Mr. Klaus I went to Rockford and interviewed Mr. Bradley to try to collect. Mr. Bradley said there was a termination claim and we should file it with the government and collect our money. We said it was impossible because it wasn't a termination contract but merely a cancellation of our order and Bradley agreed we couldn't file a claim and said he couldn't pay the money then, but would appreciate it if we could reduce the figure. We said we didn't have authority and he asked if he could make payments. We agreed on a payment of \$750.00 a month until the entire amount was liquidated. I believe Bradley had his Accounts Receivable Ledger brought in and checked it and said it would be two weeks before he could make a payment." Upon cross examination this witness said: "There was some discussion of the original transaction, Bradley saying the tooling job cost him over the \$1550.00 which had already been paid. My testimony confirms that of Mr. Klaus, that Bradley asked to make it less, we said we hadn't any authority and he said he couldn't pay it now and we finally agreed on monthly installments." This witness further testified that thereafter he talked to Mr. Bradley over the phone and that Bradley stated he would send the \$750.00 check as soon as he received some expected checks from parties indebted to the defendant. That in February he again went to Rockford and had a conversation with Mr. Bradley in his office, that Mr. Bradley then stated he didn't have the money to

Pay the amount agreed upon but would try to make the payment in the near future and that in none of the conversations this witness had with Bradley after the January meeting did Bradley say anything about not owing the money.

On January 14, 1946, Mr. Klaus wrote defendant directing his letter to the attention of Mr. Bradley: "This will confirm the agreements reached in a conference held in your office on Thursday, January 10, which conference was attended by yourself representing Blackhawk Machine Co. and W. Marceil and the writer representing the Four Wheel Drive Auto Co. Your records as well as those of F.W.D. agree in that the Blackhawk Machine Co. owes open account to the Four Wheel Drive Auto Co. the amount of \$3642.79. You agreed that this amount would be paid in the following manner: \$750.00 to be paid on or before January 20, 1946, \$750.00 to be paid on or before February 20, 1946, \$750.00 to be paid on or before March 20, 1946, \$750.00 to be paid on or before April 20, 1946, \$750.00 to be paid on or before May 20, 1946 and the balance of \$642.79 to be paid on or before June 20, 1946. This will clean up the account in full." Mr. Bradley testified that he made no reply to this letter "because I was too busy."

On January 23, 1946 Mr. Marceil wrote Mr. Bradley: "This letter is to remind you that as yet we have not received your check in the amount of \$750.00 to cover the first payment on January 20 to be applied against the credit balance on our account in accordance with our agreement, confirmed by our Mr. W. G. Klaus' letter of January 14th. May we have this check within the next few days." No reply was ever made to this letter.

It is insisted by counsel for appellant that neither count of the complaint states a cause of action and that the

evidence wholly fails to sustain ^{the} averments of either count. We have set forth the evidence quite fully and considered the authorities relied upon and in our opinion there is no merit in any of the contentions of appellant. The questions presented by this record are solely questions of fact. The issues made by the pleadings ^{were} ~~are~~ submitted to the trial court for determination. He saw and heard the witnesses and in his statement at the conclusion of the hearing, referring to the conference in the office of Mr. Bradley on January 10, 1946 said: "The preponderance of the evidence, in the opinion of the court, is overwhelming, that the agreement was entered into and that Mr. Bradley did agree to pay \$3642.79 and that agreement is, as I say, shown by a clear preponderance of the evidence."

Counsel for appellant however argue that at the time of this conference the position of the defendant was that the plaintiff was indebted to it and that the position of the plaintiff was that defendant was indebted to it, that there was no balancing of accounts, that an account stated cannot be made the instrument to create an original liability but merely determines the amount of the debt where liability previously existed. Of course if defendant was not liable to the plaintiff in any amount, the mere presentation of a claim by the plaintiff to the defendant would not create a liability. It is conceded here by the defendant that the plaintiff on July 13, 1945 paid the United States Treasury on behalf of the defendant and at its request the sum of \$895.31. The claim of the defendant that the plaintiff was indebted to it in the sum of \$5661.83 tooling charge was definitely rejected by plaintiff in June 1945. Again in December of that year and also at the meeting of the

executives of both companies on January 10, 1946. At that meeting the weight of the evidence is that the representatives of both companies discussed the amount each was claiming from the other and that the tooling charge which plaintiff rejected was discussed and Mr. Bradley then requested plaintiff to file it with the government and collect it for the defendant and when Mr. Bradley was advised that was impossible because it was not a termination contract but a cancellation, an agreement was then entered into, the provisions of which were that defendant would pay and plaintiff would accept a definite amount in monthly installments in satisfaction of the amount which the parties agreed was due the plaintiff and it is this agreement which plaintiff alleges in its second count, the averments of which are, in our opinion, sustained by the evidence.

In support of its counterclaim, defendant, upon the theory that it had a contract with the plaintiff for the tooling and machining of upwards of one thousand axle housings, offered to prove that it tooled and implemented its factory at a cost of \$7641.87 in order to carry out that contract. The court correctly sustained an objection to this offer as the evidence disclosed the only amount which plaintiff agreed to pay for tooling was \$1550.00 as specified in the purchase order of January 5, 1945, which defendant accepted.

In our opinion the findings and judgment of the trial court are supported by the evidence and that judgment will be affirmed.

Judgment affirmed.

O.K.
H.W.B.

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33 - 11-525²

Gen. No. 10249

Agenda No. 20

IN THE
APPELLATE COURT OF THE
SECOND DISTRICT

FEBRUARY TERM, A. D. 1948

612
[Signature]

FLOYD RICHTER, JOHN W.
RICHTER, ANNA L. RICHTER,
and M. HABLE WHITE
Petitioners-Appellees

vs

CITY OF MT. CARROLL, a
municipal corporation
Defendant-Appellant

APPEAL FROM THE COUNTY
COURT OF CARROLL COUNTY

Dove, J.

Appellees filed an amended petition in the County Court of Carroll County seeking the disconnection of six separate parcels of land owned by them from the limits of the city of Mt. Carroll. Appellant filed its answer which was afterward amended, to which a reply was filed. The cause was heard by the County Court upon a stipulation of the parties resulting in an order disconnecting each of the six tracts of land from the territory embraced within the corporate limits of the city of Mt. Carroll, the order specifically providing "but nothing herein contained shall be construed as exempting said lands from taxation for the payment of debts of said municipality, contracted prior to

the filing of the petition herein." From this order the defendant prosecuted an appeal to the Supreme Court upon the assumption that the constitutional validity of a Statute was involved. (Richter v. City of Mt. Carroll, 398 Ill. 473).

The supreme court transferred the cause to this court and in its opinion said: "A stipulation of the parties discloses that plaintiffs have satisfied the requirements of the statute and are entitled to the relief sought unless Section 43 of Article 7 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1945, chap. 24, par. 7-43) is unconstitutional in the respects charged by defendant." The stipulation and the contentions of the respective parties are fully set forth ^{in the opinion} and in commenting upon Punke v. Village of Elliott, 364 Ill. 604 and Geweke v. Village of Niles, 368 Ill. 463, the court said: "We held that the General Assembly not only has authority to determine the territory and boundaries of various municipal corporations but, also, to change or alter them by annexing or disconnecting territory, either with or without the consent of the corporate authorities and, further, the fact that property disconnected thereafter escapes general taxation would not render the Act of 1935 obnoxious to Sec. 23 of Art. 14". The court then continued: "Defendant urged constitutional questions in the trial court and has argued them in this court. Unless, however, the constitutional questions presented are debatable we do not assume jurisdiction of an appeal on the ground that a constitutional question is involved. (Jenisek v. Riggs, 381 Ill. 290). The mere assertion that a constitutional question is involved or that a constitutional right has been invaded is insufficient in the absence of other grounds to confer jurisdiction. (Economy Dairy Co. v. Kerner, 371 Ill. 261.) The

disposition of the constitutional objections directed against the Section of the Disconnecting Act of 1935 corresponding to Section 43 of Article 7 of the Revised Cities and Villages Act is decisive of the contentions advanced and argued upon the present appeal. This court does not assume jurisdiction on direct appeal merely to refer to earlier decisions. (Citing cases). Defendant contends further, that the Disconnecting Act violates Section 9 of Article 1X of our constitution, asserting that a municipal corporation cannot constitutionally be authorized to levy or collect taxes for other than corporate purposes nor upon territory outside the corporate limits. The order of the County Court specifically provided that the disconnection of plaintiffs' lands from the city should not be construed in any manner as exempting the property from taxation for the payment of debts of the municipality, contracted prior to the day plaintiffs filed their original petition. Since the order in this respect is entirely favorable to defendant, it is not in a position to urge the constitutional question sought to be presented. Again the parties have conceded that the bonded indebtedness is an indebtedness of the municipality which will follow plaintiffs' property until the final payment of the debt. Whether a particular obligation of the city of Mt. Carroll contracted by its corporate authorities prior to the filing of a petition for disconnection of land is an indebtedness for which plaintiffs' property shall be assessed and taxed until the debt is completely paid is a question of statutory construction and, therefore, not open to review upon direct appeal to this court."

In its petition for rehearing in the Supreme Court the defendant called attention to the foregoing words of the opinion and stated that the language used presupposes that either the appellee or appellant, as part of the relief prayed for, has asked the court to determine whether the obligations incurred by the city of Mr. Carroll constitute indebtedness. Counsel then state that that issue is not involved in this appeal and that the only question involved is whether or not the Statute is constitutional. ✓

The Supreme Court having held it was, there is, therefore, nothing for this court to do but to affirm the judgment of the trial court.

Judgment affirmed.

Page 1

44390

PEOPLE OF THE STATE OF ILLINOIS
ON THE RELATION OF JOHN J. WARD,
Appellee,

v.

WALTER TUEFFEL, President,
WILLIAM MILLER, Clerk, FRANK J.
MARIK, ALFRED WITTERSHEIM, PAUL
MEYER and JOHN A. YANCKOWITZ,
Trustees of the Village of
Bellwood,
Appellants.

APPEAL FROM SUPERIOR COURT
COOK COUNTY.

33-1A-626

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment directing that a peremptory writ of mandamus issue commanding the defendants, as president, clerk and trustees of the Village of Bellwood, "forthwith to issue to this petitioner a Certificate of Election to the Office of Trustee of the Village of Bellwood," etc.

Relator, a veteran of World War 2, resided with his parents in Barrington, Lake county, until his induction into service in 1942. While in service he married. His wife had no fixed abode. At times she lived with his parents in Barrington, and later in Oak Park where they had moved. She lived with her parents and an uncle at various addresses in Chicago and on several occasions lived near the various places in the country, to which relator was assigned. He was discharged from the Army March 3, 1946, and thereafter, until moving to Bellwood, lived in Chicago and Oak Park. On March 16, 1946 he went to Bellwood and looked at three houses on Gladys avenue and on or about April 3rd selected the middle house. At that time the walls were up and the roof was on, and immediately thereafter windows were put in. On April 20th no one was living in any of the three houses, no furniture was in any of the buildings and the plasterers were just beginning to work. The bath tub was there but not connected. On April 20th he paid

2.

the contractor \$250. On April 23rd a formal contract for the purchase of the premises was entered into and a payment of \$500 made. It was September when he actually moved the bulk of his furniture, and the first day he slept in the building at Bellwood was in the latter part of September, 1946. He got a key about April 10th and moved a food locker and chest into the building "quite a while before I moved the rest of my stuff in September." In November 1946 he voted in Bellwood, having registered in October. He reregistered in March 1947. At the election held April 15, 1947 he was a candidate for the office of Village Trustee and received sufficient votes to elect him if qualified for the office. The Board of Trustees unanimously held him disqualified for the office of Trustee of the village because he had not "resided therein at least one year next preceding his election," as required by section 9-87, chap. 24, Ill. Rev. State. 1945. This petition for writ of mandamus was immediately filed, charging prejudice and fraud in denying relator his right to the office. Defendants answered, denying the jurisdiction of the court in the premises and also denying the charges of prejudice and fraud and asserting that relator was not qualified for the office because of lack of residence. On hearing, the foregoing facts were established without contradiction.

To be eligible to the office relator must have resided in the village at least one year next preceding his election: that is, he should have established a residence not later than April 15, 1946. He had never lived in Bellwood prior to moving into the house on Gladys avenue in September 1946. He had not signed the agreement to purchase the property ^{until} April 20, 1946, when the premises were vacant and in fact uninhabitable. Physical presence and an actual abode are necessary to the acquisition of a new residence or domicile. Dorsey v. Brigham, 177 Ill. 250, 263-267; Welsh v. Shumway, 232 Ill. 54, 76-79, 80-81, 88-89. Relator had not acquired a residence in the village within a year next pre-

3.

ceding his election and was not qualified for the office of Trustee. The trustees having decided correctly, the charges of prejudice and fraud, if true, would be unavailing to the relator. However, there is no evidence to sustain these charges other than political opposition of some of the trustees to relator, and it is conclusively shown that the trustees acted upon the advice of the Village Attorney as to relator's qualifications to the office.

We do not pass upon defendants' contention that the court was without jurisdiction to review defendants' actions by mandamus, the Board of Trustees being the judges of the qualifications of its members under the statute - citing, among other authorities, Foley v. Tyler, 161 Ill. 167, and Hildreth v. Heath, 1 Ill. A.p. 82.

The judgment is reversed.

REVERSED.

Feinberg, J., concurs.

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44417

ARTHUR B. HALL, et al.,
Appellants,

v.

HELEN SNOW JONES, et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
COOK COUNTY.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an adverse finding and judgment entered after trial before the court without a jury in their action for real estate commissions.

The defendant Yale University is the owner of certain commercial property on south State street, Chicago, subject to the life estate of the defendant Jones. Miss Shine was the agent of defendant Jones in the management of the property. In 1945 the premises were under a long term lease which had been assigned to the Portis Hat Company. This lease gave the lessor the right to terminate it on May 1, 1945 or at any time thereafter upon six month's notice in the event lessor enters into a bona fide lease of the entire building to one tenant for a period of 20 years or longer, reserving, however, to the lessee the right to "rent the said property under the same terms and conditions as any third party has agreed to *** lease the same and any agreement between lessor and a third party with reference to *** lease for twenty years or more, shall be subject to the prior right and option granted herewith to lessee." In 1945 Sampson, an agent of plaintiffs, after a talk with Miss Shine, procured the execution of a lease between the defendant Jones and the Liberal Credit Clothing Company, subject to the above mentioned provision giving the Portis Hat Company the right to meet its terms and conditions. These terms and conditions were met and a new lease was entered into with the Portis Hat

2.

Company.

Plaintiffs' statement of claim alleges that in the early part of May 1945, Sampson, representing the plaintiffs, inquired of Miss Shine if the building was available for a long term lease and was informed that the lease then covering the premises contained the provisions stated above, and that "Miss Shine informed the said Sampson that if he could produce a new lessee whowould pay sufficient rent and satisfy the provisions of the then executed lease as set forth in the preceding paragraph, that the defendants would make a new lease, but that the said Sampson would have to present a bona fide lease duly executed by the new lessee." By its answer the Yale University denied the agency of Miss Shine, and no evidence was offered by plaintiffs to establish that agency as to the Yale University. At the close of plaintiffs' evidence the court made a finding for the university. Defendant Jones offered certain testimony, and at the close of all the testimony the court found for her. It appears conclusively from the evidence, as well as from plaintiffs' statement of claim, that plaintiffs were fully informed of the right of the Portis Hat Company to meet the terms and conditions of any new lease with a third party, and that they procured the lease with their client, understanding that if the then tenant of the building accepted the same terms and conditions, the lease with plaintiffs' client could not be operative. They were therefore attempting to procure a lease which would not be met by the tenant of the building. They failed to procure such a lease and are not entitled to commissions, even though as a result of their efforts the tenant in possession entered into a new lease more favorable to the lessor. There is nothing in the evidence to indicate an intention or undertaking on the part of the lessor to pay a commission if the lease with their client did not become effective. because its terms were met by the lessee under the existing lease.

3.

The judgment is affirmed.

AFFIRMED.

Feinberg, J., concurs.

The judgment is affirmed.

W. G. R. 1904

Reversed, 4, 5, 1904

44430

OLIVER MACHINE TOOL CO.,
Appellant,

v.

JOHNSON FARE BOX CO.,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in the Circuit Court of Cook County to recover the balance claimed due it upon a contract for the manufacture of certain "thrust pins", made from steel furnished by defendant. A counterclaim, filed by defendant, was dismissed on its own motion. Upon a trial without a jury, the finding and judgment was for defendant, from which plaintiff appeals.

The evidence clearly establishes that in January, 1944, defendant placed its first order with plaintiff for 60,000 such pins; that deliveries under this order were made in about 30 installments over a period beginning March, 1944, and ending November, 1944. It is admitted that both sides fully performed under this order. Several times during the deliveries under the first order, defendant rejected some of the deliveries and was given credit on its order. On August 30, 1944, before the completion of the first order, defendant sent another written order, marked "Purchase Order", for 60,000 such pins. On the reverse side was printed: "Very Important! * * * we reserve the right to reject and return at your expense all materials not complying with our inspection or in excess of quantity specified. The first delivery under the second order was on December 6, 1944 and was completed in 16 installments over a period of 5 months. The order, by agreement, had been reduced to 55,000 pins.

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Although only 54,301 had been delivered, no question is raised as to the difference. After 4 deliveries had been made under the second order, defendant sent in a revised print to plaintiff and requested the manufacture of the balance of the pins due on the order be in accordance with the new print. Plaintiff acknowledged receipt of the revised print and promised to machine the balance of the order in accordance therewith. The revised print had to do with the shape of the end of the shank of the pin. About February 8, 1945, there was a discussion between plaintiff and defendant's representative concerning the quality of the work involved in shipments under the new print, the complaint principally being that the corners of the square end of the pin were either too short or too long, making the end "out of square."

An inter-office memorandum of defendant was introduced in evidence by plaintiff, which reported the result of the representative's conference with plaintiff. The report stated: "Oliver Machine Co. was advised that when setting up for new production to contact us in order that a definite agreement and a standard can be established as to the condition of the cut-off end, the .010 radius and .059 diameter. Meanwhile, all Thrust Pin ends, will be ground and edge rounded off by us but those having a rough finish on .059 diameter will be returned to Oliver Machine Co. for replacement."

It also appears that on May 14, 1945, about 17 days after the delivery of the last of the 16 installments, defendant returned 31,230 thrust pins, claiming a credit of 25¢ each, because of the alleged defective condition of the square ends of the pin. On May 21, 1945, plaintiff returned the 31,230 rejected pins to defendant. Admittedly, some of the rejected number of pins were parts of shipments in November, 1944, under the first order.

The first thing I noticed when I stepped out of the car was the cold, crisp air. It felt like a blanket, wrapping around me. I took a deep breath, savoring the scent of pine and the distant hum of traffic. The city was still in its early morning slumber, the streets empty except for a few stray cars and the occasional pedestrian. I walked towards the park, my footsteps echoing on the quiet pavement. The sun was just beginning to rise, painting the sky in soft, pastel hues. I felt a sense of peace, a moment of stillness in a world that was always in motion. The park was beautiful, with its lush green grass and tall, leafy trees. I sat on a bench, watching the world wake up around me. The birds began to sing, their melodies filling the air. The children started to play, their laughter ringing through the trees. It was a beautiful sight, a new day dawning in the heart of the city. I felt grateful for this moment, for the chance to start fresh and embrace the possibilities of the day ahead.

I had been thinking about this trip for a long time. It was a chance to escape the routine of everyday life, to go somewhere new and experience something different. The weather was perfect, not too hot, not too cold. The people were friendly, and the food was delicious. I had heard so much about this place, and now I was finally here. It was everything I needed and more. I had found a new place to call home, a place where I could start over and build a new life. The trip had been a journey of discovery, both for me and for the people I had met along the way. I had learned so much about myself and the world around me. I had found a sense of purpose and a new direction. I was ready to take on whatever came my way. The trip had been a success, and I was proud of what I had accomplished. I was ready to start a new chapter in my life, and I was excited to see what the future held for me. The trip had been a journey of growth and change, and I was grateful for every moment of it. I was ready to embrace the challenges ahead and to live my life to the fullest. The trip had been a journey of hope and dreams, and I was ready to make them a reality. I was ready to start a new life, and I was excited to see what the future held for me. The trip had been a journey of discovery, both for me and for the people I had met along the way. I had learned so much about myself and the world around me. I had found a sense of purpose and a new direction. I was ready to take on whatever came my way. The trip had been a success, and I was proud of what I had accomplished. I was ready to start a new chapter in my life, and I was excited to see what the future held for me. The trip had been a journey of growth and change, and I was grateful for every moment of it. I was ready to embrace the challenges ahead and to live my life to the fullest. The trip had been a journey of hope and dreams, and I was ready to make them a reality. I was ready to start a new life, and I was excited to see what the future held for me.

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From another inter-office memorandum among the records of defendant, signed by defendant's representative, Belbes, dated June 15, 1945, it appeared that this rejection included shipments made from November, 1944, to April, 1945, that "because of the inability of our Inspection Department to keep up with the inspection of this part, no disposition had been made for several months. It was known, however, that a large per cent of these parts were defective, but because of the urgent need for them it was deemed advisable by management some months ago, to work them over by grinding and polishing end." The following appears in paragraphs 6 and 7 of the memorandum:

"6. Under the surrounding circumstances it is the opinion of the writer that the matter be disposed of as follows:

| | |
|-----------------------------------|---------|
| Accept (polish and use)..... | 24, 190 |
| Reject and claim credit..... | 7,040 |
| OR | |
| Accept..... | 9,848 |
| Accept but pay for grinding only. | 21,382. |

7. In view of this situation there will be sufficient Oliver Machine Company Thrust Pins on hand to complete our contract and, therefore, no further purchase should be made through new source."

The rejected pins were retained by defendant and reworked by defendant. Counsel for defendant on the trial stated: " * * * I want to make this statement to the Court, that so far as the cost of reworking the pins is involved, we are not in position to prove the cost of reworking the pins, and to that extent that part of the counterclaim is out of this lawsuit by way of defense. I have no way of proving the cost of reworking them, so I am obliged to withdraw that item from the counterclaim."

With knowledge of the defective condition, defendant's retention of the number rejected, and reworking them, gave it, if it had a meritorious claim for alleged non-performance on the part of plaintiff, the right to offset plaintiff's claim with the cost of reworking the defective parts. Rehr v. West, 333 Ill. App. 160;

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Figure 1. The proposed model for the development of the *Staphylococcus aureus* infection in the skin of the patient with rheumatoid arthritis. The model is based on the results of the study of the pathogenesis of the infection in the skin of the patient with rheumatoid arthritis. The model shows the interaction between the immune system and the bacteria. The immune system is represented by the cells of the immune system (T cells, B cells, and macrophages) and the bacteria are represented by the *Staphylococcus aureus* bacteria. The interaction between the immune system and the bacteria leads to the development of the infection in the skin of the patient with rheumatoid arthritis.

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Davidson v. Wisconsin Chair Co., 333 Ill. App. 426, 432. It could make no proof of the cost, as shown by the frank statement of defendant's counsel. Under these circumstances, plaintiff clearly was entitled to recover the balance due it on the order in question. Wolf Co. v. Refrigerating Co., 252 Ill. 491, 504.

The trial court erred in finding for defendant. It should have entered a finding and judgment for plaintiff. Accordingly, the judgment of the Circuit Court is reversed, and judgment is entered here for plaintiff in the sum of \$2,766.25.

REVERSED AND JUDGMENT ENTERED HERE.

Niemeyer, P. J., concurs.

44436

MEYER POLL,

Appellee,

v.

ROBERT O. GOSSETT,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

33-1A-2231

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in plaintiff's favor in an action in the Municipal Court of Chicago in forcible detainer, awarding possession to plaintiff of an apartment leased to Seibert A. Ross. The lease is dated August 2, 1947, and by its terms expires December 31, 1948. It contained the usual clause against transfer or subleasing of the demised premises without the consent of the lessor.

The evidence clearly establishes that Ross vacated the premises on or about November 15 and left defendant, his brother-in-law, and the latter's wife in possession of the premises. Ross paid the rent for August, September, October and November of 1947, but the rent tendered by him for December, 1947, and January, 1948, was returned to Ross at his new address, 1241 West Granville Avenue. It clearly appears that defendant never attorned to plaintiff nor was any rent tendered by him, and when plaintiff discovered he was in possession, refused the further tender of rent from Ross and properly brought this action. Rehm v. Halverson, 94 Ill. App. 627, affirmed 197 Ill. 378.

The finding and judgment of the Municipal Court is fully sustained by the evidence. Accordingly the judgment is affirmed.

AFFIRMED.

Niemeyer, P. J., concurs.

44361

ELIZABETH BORCHART,
Appellee,
v.
CITY OF CHICAGO, a Municipal
Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
COOK COUNTY.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT

Defendant appeals from a judgment for \$4,000 entered in plaintiff's action for injuries sustained because of a defective sidewalk.

The evidence shows without contradiction that on the night of July 9, 1945 at about 10:30 o'clock plaintiff and her husband were walking east on the north side of Armitage avenue between Kilbourn and Kenneth avenues; they stopped to talk with some friends, after which the husband and another man preceded plaintiff in their walk toward Kenneth avenue; plaintiff stepped into a hole about 6 inches in depth, 24 inches from east to west and 12 inches from north to south and nearer the curb than to the building on the north; she fell and fractured her shoulder; she had lived in the neighborhood all her life, was familiar with the sidewalk and knew of the hole into which she stepped. There was a city light on a pole about 75 feet east of the hole but on the evening in question the light was not burning. The nearest street light was three-quarters of a block to the west at the corner of Kilbourn avenue. It was a very dark night. Defendant contends that, having knowledge of the defect in the sidewalk, plaintiff was guilty of contributory negligence as a matter of law in using the sidewalk. The case is not unlike that of Phillips v. City of Chicago, 332 Ill. App. 443 (Abst.), where we held adversely to defendant's contention. Even where

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there is no conflict in the evidence, if uncertainty arises as to the inferences that may be legitimately drawn therefrom so that fair-minded men may draw different conclusions, the question is not one of law but one of fact. Turner v. Cummings, 319 Ill. App. 225; Minters v. Mid-City Management Corp., 331 Ill. App. 64.

Defendant further contends that the damages awarded are excessive. Plaintiff's shoulder was fractured, resulting in a permanent deformity of the head of the humerus, greatly restricting motion in the shoulder joint. The attending physician testified that because of adhesions, short-wave diathermy treatments were necessary; that without these treatments the shoulder joint would be stiff, and that with treatments not more than 50 to 60 per cent of the shoulder motion was attainable. Upon these facts we cannot say that the damages are excessive.

The judgment is affirmed.

AFFIRMED.

Feinberg, J., concurs.

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APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

33-17029

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plaintiff was riding as a passenger on a bus of defendant Motor Coach Company, being operated in a northerly direction on Michigan Avenue, and which collided with a truck of defendant Reinhardt at the intersection of Michigan Avenue and 29th Street in Chicago. The weather was clear and the pavement dry. The bus was crowded, and there were passengers in the aisle. Plaintiff was seated in the first cross seat on the east side of the bus. The intersection was controlled by traffic lights. There is a sharp conflict in the evidence as to which defendant violated the traffic light regulations and the Motor Vehicle Act governing the right-of-way of the vehicles in question.

Plaintiff, as a result of the collision, was knocked to the floor of the bus and was assisted to a taxicab, which conveyed

SAINT JOHN'S HOSPITAL,  
BOSTON, MASS.

W.

DR. J. H. HARRIS, JR.,  
100 N. W. 10th St.,  
St. Paul, Minn.

Dear Sir:

Enclosed for you are two copies of a letter

from the American Medical Association, dated June 1, 1914.

The letter is a copy of the letter from the American Medical Association, dated June 1, 1914.

It is a copy of the letter from the American Medical Association, dated June 1, 1914.

Very truly yours,  
J. H. Harris, Jr.

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her to a hospital. She was in no position, because of the crowded condition of the bus, to see how the accident happened. She testified she was in good health before the accident; that she was on her way to work for the Chicago Health Department; that she did clerical work and was earning \$1,440 a year at that time; that after she was picked up from the floor, she was dazed; that her knees were badly bruised, her back and right side hurt her, she had a terrific headache, and was sick and nauseated; that at the hospital they gave her first aid treatment and X-rayed her knee; that, thereafter, she was taken home and remained in bed for 2 or 3 weeks; that during that period she was extremely nervous, had headaches, her back hurt, had dizzy spells and was not able to sleep without taking some drug; that she was attended by Dr. Barry until the latter part of February, 1944; that she then consulted another physician, Dr. Hershfield, who was consulting neuro-psychiatrist in the Chicago Board of Health; that he gave her massage treatments and applied some salve.

Plaintiff called the bus driver as her witness, who in substance testified that as he approached within 5 feet of the south sidewalk on 29th Street, operating his bus in a northerly direction on Michigan Avenue, the traffic light for north and south traffic was amber, and that he continued on; that he first saw the truck when it was traveling east on 29th Street and was past the west curb line of Michigan Avenue, about 15 or 20 feet west of the center line of Michigan Avenue; that at that very time his bus was south of the south safety island on Michigan Avenue, which was 4 feet south of the south curb line of 29th Street; that the safety island is in the middle of the street; that the right front of his bus struck the rear end of the truck; that the truck was going better than 30 miles an hour when he first saw it and seemed to be picking up speed all the time; that the other vehicle did nothing with reference to changing its



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direction from the time he first saw it and the time of the impact; that the truck came to rest upon the northeast corner of 29th Street and Michigan Avenue; that there were about 50 to 55 passengers on the bus; that he was going about 4 miles an hour at the time of the accident.

Plaintiff called as a witness Florence Wright, a passenger on the bus, who testified that as the bus approached 29th Street the traffic signal light was red, the light on the northwest corner was red, and it was red when the bus was about 45 to 50 feet from 29th Street. She had signed two statements procured by the representative of the Motor Coach Company, which were received in evidence to impeach her testimony that she saw the lights. Each defendant introduced evidence tending to prove the negligence of the other in the operation of the vehicles involved in the accident.

Upon the record before us, the conclusion is inescapable that plaintiff could not be guilty of contributory negligence. She was a victim of the negligence of either or both of the defendants, and it cannot be that both were free from negligence.

In Fearlman v. King Lumber Co., 302 Ill. App. 190, where the claim was based upon the negligence of two defendants, arising out of a collision of vehicles, in which plaintiffs had no part, but their automobiles, parked, were damaged as a result of the collision of the defendants' vehicles, this court said:

"Either one or both of the defendants are guilty. The only question for the jury to decide is, which one of the defendants is guilty, or both, and the amount of damages."

To the same effect, Louis v. Checker Taxi Co., 318 Ill. App. 71; Turner v. Cummings, 319 Ill. App. 225; Aarseth v. Stein, 278 Ill. App. 16.



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It is argued by defendants that the evidence supports their theory that the injuries complained of are not shown to be direct and proximate result of the accident; therefore, there is no basis for the recovery of damages for the claimed injuries. Since we conclude there must be a new trial, we shall not discuss the sufficiency of the evidence as to the causal connection between the accident and the injuries complained of, nor the sufficiency of the evidence to prove the claimed loss of earnings was directly attributable to the accident. The fact appears uncontradicted, that she was obliged to and did pay Dr. Hershfield \$160 for his services in treating her claimed injuries.

For the reasons indicated, the judgment of the Superior Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Niemeyer, J., concurs.

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